1978

Bank of Salt Lake, A Utah Corporation, And Norton Parker, An Individual v. Globe Leasing Corporation, A Utah Corporation; Al Weigelt And Gloria Morrison, Individuals : Abstract of Transcript

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

BANK OF SALT LAKE, a Utah corporation, and NORTON PARKER, an individual,

Defendants-Appellant,

vs.

Case No.

15337

GLOBE LEASING CORPORATION, a Utah corporation; AL WEIGELT and GLORIA MORRISON, individuals,

Plaintiffs-Respondent.

ABSTRACT OF TRANSCRIPT

An appeal from a judgment of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge.

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ABSTRACT OF TRANSCRIPT

VOLUME I

AUGUST 3, 1976

DIRECT EXAMINATION OF ALFRED B. WEIGELT BY MR. McRAE:

Alfred B. Weigelt was, in 1973-1974, President and General Manager of Globe Leasing, a corporation incorporated in the State of Utah. Other officers at the time of incorporation were Stephen Crowley and Mr. Dee, an attorney. The original incorporators got out approximately two months after incorporation. Globe Leasing officially began business in late July of 1973. (Tr Vol. 1 at 2)

From 1955 to 1960, Mr. Weigelt was a fleet administrator for Gulf Oil Corporation. From 1960 to 1963 he was a national marketing manager for an international-New York based plan. For the next three years, he worked with Chrysler Leasing Corporation as a national sales administrator, and also as a regional manager for all car leasing in Salt Lake City. He then formed Globe. (Tr Vol. 1 at 3)

Mr. Weigelt attended two years of college with some additional coursework thereafter. He is currently 45 years old. (Tr Vol. 1 at 3)

Mr. Weigelt testified that just prior to July of 1973, he made contact with the Bank of Salt Lake, his ini-

tial contact being with Mr. Perry. Mr. Weigelt was interested in the Bank of Salt Lake as a source of financing for Globe. Mr. Weigelt presented to Mr. Perry a book which he had developed. It contained various publications dealing with leasing such as leasing manuals for leasing companies. (Tr Vol. 1 at 3-4)

Mr. Weigelt also testified that he had some contact with Mr. Kelson, Mr. Mendenhall, Mr. Chaney and one other individual at the Bank of Salt Lake between the time he first contacted Mr. Perry and July 15, 1973. (Tr Vol. 1 at 4-5)

Mr. Weigelt testified to a familiarity with the standards and trade practices of the automobile leasing business and that but for the fact that equipment leases are longer than automobile leases and the financing is a little different, they are basically the same. He further testified that in the formulation of lease prices, automobile leasing businesses consider acquisition of equipment involved and the credibility of the potential lessee. According to Mr. Weigelt, automobile leases average between 24 and 36 months and a "lease factor," sometimes called a "multiplier," is a set figure which is multiplied out with the capitalized cost of a vehicle to come up with a reasonable amount that should be considered total rent. He testified that interest rates bear upon the amount of rent; that Globe recovers their interest rate

by means of the lease payment that is being made to the company; and that repossession is a consideration. (Tr Vol. 1 at 5-6)

Mr. Weigelt's testimony concerning the procedural aspects of the relationship between Globe and the Bank of Salt Lake was that the credit of Globe's customers was first approved by Globe pursuant to a written credit application obtained from the customer. Globe would look at the assets, current obligations, and credit references of their potential customers. If Globe approved the customer's credit application, it would relay the credit information received from the customer to the Bank of Salt Lake along with their credit-check sources. The Bank would then advise Globe as to whether or not they approved the transaction. (Tr Vol. 1 at 6-8)

Mr. Weigelt testified that his meeting with Mr. Kelson and Mr. Mendenhall a few days after his initial contact with Mr. Perry took place in Mr. Perry's absence. Mr. Perry was on vacation at the time. The meeting was held in the Bank's board room. Mr. Weigelt's book was discussed and he was asked questions about his theory of the leasing business including methods on approaches for capitalizing cars and equipment. With respect to financing the leases, an arrangement was discussed wherein Globe would be advanced an amount equal to the capitalized

cost of the vehicle. That amount would be credited to Globe either by separate check or by credit to a checking account. Further discussion was to the effect that when the transaction was approved, Globe would then purchase the vehicle from the dealer in question, secure the lease documents from the lessee, collect the money due under the terms of the lease, and deliver the vehicle. Mr. Weigelt stated that on the title, Globe Leasing was to be indicated as the owner of the vehicle and the Bank of Salt Lake as lienholder. (Tr Vol. 1 at 8-11)

Mr. Weigelt stated that after this meeting, he had daily contact with the bank officers until he was advised that the transaction was approved on or about July 15, 1973. Subsequent to that, Mr. Weigelt received Exhibit 8-P from Mr. Perry. (Tr Vol. 1 at 11)

Exhibit 17-P contains 64 individual vehicle lease files plus all of the paperwork pertaining to each lease. The purchase price of the vehicle was exactly the amount obtained from the Bank on the first six leases. This procedure was changed when Globe found out that they could not sustain themselves as a company with the insufficient moneys coming in from the leases. According to Mr. Weigelt, in the new formula for borrowing against a lease, the acquisition cost of the vehicle was utilized plus a markup which was a determined amount based on a certain percent,

7-10 percent over cost. That markup amount was retained by Globe. (Tr Vol. 1 at 12-13)

Mr. Weigelt also testified that Globe, as a leasing company was able to purchase vehicles at $75-200 over factory invoice. (Tr Vol. 1 at 13)

Mr. Weigelt's further testimony was that after the credibility of the lease customer was ascertained, Globe would determine the residual value of the vehicle being leased with the use of all of the current guides in the automotive trade. A new $5,000 car he said, would depreciate by 50 percent in two years leaving a residual value of $2,500. In conducting this analysis, reference to the Black Book, NADA, Kelly Blue Book, Automotive News, and others were made. Globe would then subtract the projected residual value from the capitalized cost of the vehicle and that would be deemed the depreciation. That figure would then be divided by 24 for a 24 month lease. (Tr Vol. 1 at 13-15)

According to Mr. Weigelt, the second portion of the lease payment would consist of the interest on the lease. In the leasing business he testified, a straight add-on factor is utilized in consummating a lease. The add-on factor is determined based on the interest the leasing company is required to pay. The add-on factor is part of the profit of the leasing company. (Tr Vol. 1

at 15)

The next factor would be to add on the applicable state use tax. That percentage of the monthly rent would be added on to the lease to come up with the total monthly rent that the lessee was obligated to pay Globe. The appropriate Annual Percentage Rate was then applied to the balloon payment. (Tr Vol. 1 at 15-16)

Globe would borrow the capitalized cost of the vehicle plus ten (10) percent from the Bank. (Tr Vol. 1 at 16)

Going through file Number 26 for illustrative purposes, Mr. Weigelt pointed out that on the front of the file he would note the lease number, date of purchase, make, model, serial number, license plate number and the name of the dealer for whom the account was made. He would also note the date he mailed the payment book and "thank you" card to the customer. Mr. Weigelt indicated which documents are contained in each jacket as follows:

> "Well, there's a copy of the lease agreement, Pages 1 and 2 of the lease computation work sheets, another photocopy of the original lease, internal calculations sheet by Globe Leasing, a copy of the vehicle purchase order from Globe Leasing to the dealer, a copy of the invoice from the dealer to Globe Leasing, another copy of the factory invoice from the dealer to Globe, the lessee's first check to Globe Leasing, the insurance certificate, and a copy of the check rendering payment to the dealer."

With respect to the insurance certificate, Mr. Weigelt stated that he had to secure the actual insurance policy from the lessee's carrier. Sometimes it would take two to three months to receive the actual policy. Globe Leasing would be named as the additional insured with the Bank also named as a loss payee. According to Mr. Weigelt, within the automobile leasing industry, the leasing company maintains the policy of insurance and provides copies of insurance policies to the lending institution. It was Globe Leasing's function to make sure that there was casualty and collision coverage. The Bank, did in fact, request Globe for copies of insurance policies. Globe also got certificates of insurance from the companies they leased to. (Tr Vol. 1 at 17-19)

In formulating the lease program, Globe calculated the residual for purposes of profit by using the NADA or some other reputable guidebook. Globe would then consider other factors such as excess mileage and excess wear and tear, subtract that from the net residual, to arrive at a "net net" residual. (Tr Vol. 1 at 19-20)

Globe, according to Mr. Weigelt, agreed to give the Bank all sums collected from the lessees. He testified that this sacrifice of cash flow was to enhance Globe's position at the termination of each lease. He

didn't know the cost spread between Globe's costs and the amount charged to lessees although he testified that the spread varied. As an example, he testified that such variation might be attributable to a prohibitive acquisition cost on a vehicle. Specifically, from 1973 to 1974, small cars were in demand and dealers were charging premium prices on small cars. (Tr Vol. 1 at 20-22)

Mr. Weigelt testified that Globe started out paying the Bank a set rate which was .65 add-on, and the appropriate APR on the balloon. Four or five months later, Mr. Perry advised Mr. Weigelt that he had to have a higher factor because the month situation was tightening up. The factor was raised about a half a point from .65 to .7. (Tr Vol. 1 22-23)

Mr. Weigelt testified that he deposited the monthly payments from the lessee into a checking account. Globe had two accounts; one at Bank of Salt Lake and one at Valley Bank & Trust. There was also a second account at the Bank of Salt Lake, a reserve account. Mr. Weigelt testified that he and Mr. Perry agreed that three and a half percent of the total monthly rents that Globe collected within a given month would be automatically deposited into the reserve account. No checkbook was issued for that account and no interest was paid on the account. In July of 1974, there was about $600 in that account.

According to Mr. Weigelt, the reserve fund was to be utilized by Globe and the Bank jointly in case of a defeciency on any particular lease. (Tr Vol. 1 23-24)

Mr. Weigelt testified that the Bank "shot for the tenth of every month" as a date for debiting the Globe account for the payments due to the Bank. (Tr Vol. 1 at 24)

Mr. Weigelt testified that on a hypothetical lease with a car with a purchase price of $5,000, Globe would capitalize the car at $5,500, obtain that amount from the Bank and use the extra for operating expenses. (The Bank's remittance to Globe would not be for the entire $5,500 but would be less by the amount of the first month's rental payment.) (Tr Vol. 1 at 24-25)

In the leasing business according to Mr. Weigelt, monthly rentals are due at the first of the month in advance for that month. (Tr Vol. 1 at 25)

Mr. Weigelt testified that Exhibit 7-P shows the net proceeds on each lease that the Bank advanced to Globe. Each credit advice is identified by name for each and every transaction. They are numbered 1-64 in the same sequence as the names listed on Exhibit 18. (Tr Vol. 1 25-26)

Mr. Weigelt's further testimony was that Globe Leasing lasted for one year. He stated that Exhibit P-6 is an assignment of lease, which form was prepared by him.

Mr. Weigelt said that he discussed the purpose of the assignment with Mr. Perry at the time he "consummated" a letter confirming the agreement between Globe and the Bank. No one else was present during that discussion. (Tr Vol. 1 at 26-27)

The documents Mr. Weigelt prepared and delivered to the Bank of Salt Lake in the form of a package included a copy of the original lease agreement, Pages 1 and 2 of the lessor and lessee work sheets, insurance certificate, copy of the Globe Leasing purchase order acquiring the vehicle from the dealer, copy of the factory invoice from the dealer, copy of the actual invoice from the dealer to Globe, and a copy of Globe's internal work sheet as it pertained to the interest calculations. Mr. Weigelt identified Page 1 of Exhibit 12-P as an internal worksheet containing a copy of a "note" covering the vehicle and the assignment of lease. He testified that he was referring to a promissory note in another exhibit and that the payee on such notes was Bank of Salt Lake. Mr. Weigelt then testified that the front page of Exhibit 12-P is the interest calculation work sheet and the back page is a schematic on when "the vehicle would go into effect" and when the lease would actually terminate. Exhibit 12-P was received into evidence. (Tr Vol. 1 at 27-29)

Mr. Weigelt identified Exhibit 13-P as comprised of copies of the original leases. Copies of these leases are contained in each packet in Exhibit 17-P. Exhibit 3-P is a financial statement of Alfred B. Weigelt. Mr. Weigelt testified that he didn't recall the circumstances of the preparation of that statement. Exhibit 4-P, an unaudited financial statement, dated October 31, 1973, was prepared at the request of Mr. Weigelt by Randall J. Peterson, a C.P.A., for Globe Leasing. Mr. Weigelt testified that he provided the information for the preparation of the financial statement. Exhibit 5-P is another financial statement prepared by Randall J. Peterson with information supplied by Mr. Weigelt. (Tr Vol. 1 at 29-31)

VOIR DIRE OF MR. WEIGELT BY MR. KIPP:

Mr. Weigelt answered that he didn't think the Bank ever saw Exhibit 4-P, the unaudited financial statement prepared by Randall Peterson for Globe at Mr. Weigelt's request for the two months ending 1973. The statement was prepared from company records. According to Mr. Weigelt, Exhibit 5-P "has the same background" as Exhibit 4-P. The report was unaudited. The Bank saw Exhibit 5-P on or about the 17th of April, 1974, after all of the problems in this matter began to develop. (Tr Vol. 1 at 31-33)

CONTINUATION OF EXAMINATION OF MR. WEIGELT BY MR. McCRAE:

Exhibit 2-P contains comupter printouts which report on the status of Globe's accounts with the Bank. Mr. Weigelt testified that Exhibit 2-P shows all payments credited properly and on time. Globe received the printouts on the 18th or 20th of each month when the leases were submitted to the Bank. (Tr Vol. 1 at 33-34)

Exhibit 11-P is part of the insurance statement, a copy of which was delivered to the Bank. Exhibit 11-P was received into evidence. (Tr Vol. 1 at 34)

Mr. Weigelt testified that he prepared the summary contained on the front of Exhibit 6-P. That summary is a recap of bank balances at the Bank of Salt Lake and at Valley Bank and Trust. The columnar figures represent the balances at month's end at each of the two banks for the period August 1973 to July 31, 1974. Monthly bank statements are attached. (Tr Vol. 1 at 34)

VOIR DIRE OF MR. WEIGELT BY MR. KIPP:

Mr. Weigelt testified that if he had written a check to someone and that check had not yet cleared his bank, that check would be out against the balance on Exhibit 6-P and it would show up in the following month. The calculations in Exhibit 6-P consider all sums deposited in that month. (Tr Vol. 1 at 34-36)

CONTINUATION OF EXAMINATION OF MR. WEIGELT BY MR. McRAE:

Exhibit 6-P was received into evidence. (Tr Vol. 1 at 36)

Mr. McRae offered Exhibit 1-P as being similar in form to the book left at the Bank, minus the items that have separately been pulled out and identified. (Tr Vol. 1 at 36-37)

VOIR DIRE OF MR. WEIGELT BY MR. KIPP:

Mr. Weigelt testified that he didn't know if the information in Exhibit 1-P was also given to the Bank and Mr. McRae withdrew Exhibit 1. (Tr Vol. 1 at 37-38)

Mr. Weigelt said that Globe Leasing operated for about one year. He further testified that he first became aware of a problem with the Bank when he received carbon copies of communications that had been sent out to Globe's lessees. Exhibit 19-P contains a group of motor vehicle security agreements covering the 64 packets contained in Exhibit 17-P. Exhibit 20-P is the completed assignments of the lease. That is similar to Exhibit 14-P and covers the same 64 packets as Exhibit 17-P. (Tr Vol. 1 at 38-39)

Exhibits 3, 4, 5, 19 and 20 were admitted into evidence. (Tr Vol. 1 at 39)

Exhibits 9 and 10-P were received into evidence. (Tr Vol. 1 at 39-41)

END OF EXAMINATION BY MR. WEIGELT.

Exhibit 21-D contains the Bank's file on the lease transactions in question. If the appropriate bank officers were called, they would testify that Exhibit 21-D is the Bank's file involving Donald L. Hildreth. Exhibit 21-D was received into evidence. (Tr Vol. 1 at 41)

DIRECT EXAMINATION OF ROBERT F. GRUBE BY MR. EYRE:

Mr. McRae stipulated that Mr. Grube is retired from the Secret Service and is a qualified handwriting expert. Since his retirement from the Secret Service, Mr. Grube has been self-employed as a document analyst. Mr. Grube outlined his experience as a document analyst. (Tr Vol. 1 at 42-43)

Mr. Grube outlined the procedure for determining the authenticity of handwriting. (Tr Vol. 1 at 43)

Mr. Grube was shown a notarized document contained in Exhibit 21-D entitled "Affidavit of Forgery, State of California, County of Los Angeles," bearing the purported signature of Donald L. Hildreth. Mr. Grube examined that document between July 19 and July 27 of 1977. Mr. Grube was shown another document contained in Exhibit 21-D entitled, "Motor Vehicle Lease No. 0802-01-01" dated October 2, 1973, which also purported to bear the signature of Donald L. Hildreth under the caption of

"Lessee". Mr. Grube examined this document at the same time that he examined the affidavit of forgery. Mr. Grube compared the signature of Donald L. Hildreth as shown on the affidavit of forgery with that on the motor vehicle lease. Mr. Grube concluded that the author of the signature Donald L. Hildreth on the affidavit of forgery is not the author of the signature on the motor vehicle lease number 0802-01-01. He testified in support of that conclusion that the signature on the motor vehicle lease was a "drawn" signature and was not written in a free-flowing hand. The rhythm and horizontal and vertical proportions differed from the standard specimen on the affidavit forgery. There were carbon deposits from either carbon paper or pencil in the signature on the disputed document. (Tr Vol. 1 at 43-47)

CROSS EXAMINATION OF MR. GRUBE BY MR. McRAE:

Mr. Grube testified that he is not purporting to say who did sign the motor vehicle lease. (Tr Vol. 1 at 47)

END OF EXAMINATION OF MR. GRUBE

CONTINUED DIRECT EXAMINATION OF MR. WEIGELT BY MR. McRAE:

Mr. Weigelt testified that he received the documents contained in Exhibit 9 on July 16 or 17. The docu-

ments were carbon copies and the number of copies was equal to the number of lessees Globe had at the time. At the time Mr. Weigelt received Exhibit 9-P, there were three of Globe's leases pending at the Bank. After his receipt of Exhibit 9-P, Mr. Weigelt contacted Mr. Parker at the Bank. A meeting was scheduled during their conversation and was subsequently held at the Bank of Salt Lake. Mr. Peterson, Globe's CPA, Mr. Segal, an attorney, Mr. Chaney, Miss Gloria Morrison, Mr. Parker and Mr. Weigelt attended. The conversation centered upon the letters that had been sent. Mr. Weigelt testified that he was informed that Globe was being terminated and that the Bank would no longer finance the operation. Mr. Weigelt explained that Mr. Parker was unaware of the letter from Mr. Weigelt to James Perry contained in Exhibit 8-P. Mr. Weigelt further testified that he was accused of "paying someone off" at the Bank to process Globe's leases and that the bank would not process any more. Mr. Weigelt claimed at that time that he didn't pay anybody anything. Globe presented their financial statement to the Bank at that time. During the discussion there was some conversation about the loan limit having been exceeded. Some conversation about the amount of the lease payments set out in Exhibit 9-P was held and Mr. Weigelt remembered having advised Mr. Parker that the amounts were incorrect

because the total lease payments indicated in the letters did not include the tax that Globe was collecting. Mr. Weigelt indicated that Globe collected the use or sales tax on all leases and remitted that to the appropriate tax authority. Mr. Parker's response was to say that he would simply send out another letter in correction of the first letter. Mr. Weigelt recalled that discussion was had about the last three leases submitted to the Bank. At the time, those leases had been approved by the Bank of Salt Lake but Globe's account had not been credited for the proceeds. Mr. Weigelt testified that he was informed by Mr. Parker that those three leases would not be processed. He recalls that they were, however, subsequently processed. Prior to the time they were processed, he further recalled the receipt by mail of credit advices from the Bank and drew checks against those advices. He testified that the checks bounced because the money had not been credited to Globe's account. The leases in question are in the name of Lowell Summerhays, Lamar Rosquist, and Holiday Inn. Mr. Weigelt testified that his practice on receipt of credit advices was to initiate checks to the dealer from whom he was purchasing the vehicle. The amount of the check so drawn would be the amount of the purchase order. Mr. Weigelt testified that he first became aware that Mr. Parker had withdrawn the credit advices when one

or two of the dealers went to cash the checks from Globe and were refused by the Bank. Mr. Weigelt contacted Mr. Parker, and Mr. Parker finally credited Globe's account for these three leases and Mr. Weigelt issued new checks. This took about a week. (Tr Vol. 1 at 47-55)

Mr. Weigelt recalled indicating to Mr. Parker, during their meeting, that he was completely bewildered at why Globe was being terminated. He considered his account a good and well-paying account. There had been no delinquent payments to that point and had not had a car turned back by anyone. He testified that in the leasing business, the lessee is called if he is delinquent with his payment. (Tr Vol. 1 at 55-56)

Mr. Weigelt indicated that after his conversation with Mr. Parker, he received a xerox copy of a number of letters approximately equal to the number of customers Globe had. Mr. Weigelt said that he was advised by Mr. Parker that there would be no future activity on these lease files. He also testified that Mr. Parker "intimated" that he had purchased the leases instead of financing them and had a perfect right to do what he did. Mr. Weigelt indicated that he told Mr. Parker that this was strictly a financial arrangement whereby the Bank was providing Globe with funds with which to conduct their business. He also testified that he told Mr. Parker that he had protected

the Bank by various instruments both from a monetary standpoint and an equipment collateral standpoint. According to Mr. Weigelt, Mr. Parker agreed. (Tr Vol. 1 at 55-57)

Mr. Weigelt's further testimony was that Mr. Parker did not, at that time, question the status of any accounts. Mr. Parker mentioned, however, that there were too many vehicles to one entity, Leisureamerica, and that its credit was not in conformity with the Bank's criteria. In response to that, Mr. Weigelt told Mr. Parker that the Bank had approved each and every single transaction that was remitted to the Bank including Leisureamerica. Mr. Weigelt testified that Leisureamerica's payments to Globe and Globe's payments to the Bank were current on July 17, 1974. (Tr Vol. 1 at 57)

It was the testimony of Mr. Weigelt that Mr. Parker made no indication to him that there was any default of any form or any violation of any of the agreements on Globe's part except that Mr. Parker mentioned that some insurance policies were missing from the files. Mr. Weigelt further testified that Mr. Parker didn't have any acquaintanceship with the auto leasing business. (Tr Vol. 1 at 57-58)

At the above-referenced meeting, Mr. Peterson brought up the point that there was no promissory note and Globe Leasing was not really liable to the Bank of

Salt Lake. Mr. Weigelt stated that Mr. Parker did not respond to this. (Tr Vol. 1 at 58-60)

Mr. Weigelt testified that he never discussed the lack of transfer of title with Mr. Parker and, further, that the Bank of Salt Lake held the title certificates on all of these vehicles. Mr. Weigelt stated that at any time, Globe Leasing had not been removed as owner from any of the title certificates. (Tr Vol. 1 at 60-61)

Exhibit 22-P is a file folder captioned "Complaint Letters," containing various communications from lessees to Mr. Weigelt and/or Globe Leasing. Mr. Weigelt stated that he began receiving these letters as early as July 19, 1974 and continued receiving them through August 6, 1974. These letters made reference to Exhibits 9 and 10. Exhibit 22-P was received into evidence. (Tr Vol. 1 at 61)

Mr. Weigelt's testimony at this juncture was that he did not endeavor to find financing after the Bank of Salt Lake had effectively taken possession of his leases because Globe had "nothing left." He testified that by virtue of the letters contained in Exhibits 9 and 10, all lease payments went to the Bank and Globe's cash flow was, therefore destroyed. He testified further that Globe had an excellent credit rating but that within a month, their credit rating was bad. With no cash flow or leases, Globe's assets consisted of office furniture and that the effective net result

of the Bank's acts was to totally and completely put Globe out of business. After this, Globe received one more print-out from the Bank contained in Exhibit 2P dated August 20, 1974. (TR 62-63)

At the time Mr. Parker sent the letters and terminated financing for Globe, Globe had $2,900 in one account at Bank of Salt Lake and $690 in another account at that bank. With respect to these funds, Mr. Weigelt testified to having issued a check for the amount of the funds and taking it to the Bank to withdraw his funds. The check he said, was not honored. Mr. Weigelt discussed this with Mr. Parker in the presence of Mr. Peterson. Mr. Weigelt testified that this confrontation took place around the first of September. Mr. Parker refused to turn over the funds and told him they were being offset but could not tell Mr. Weigelt the basis of the offset. (TR 63-64)

Mr. Weigelt testified to having no other source of income during this period of time. He eventually gained steady employment in July of 1975. His wife gained employment in August or September of 1974 making $125 to $150 per week. Mr. Weigelt testified that despite his familiarity with the automotive and leasing businesses, he is currently employed by Eimco Mining Machinery as a purchasing agent. (TR 64-65)

Mr. Weigelt also testified that "to his knowledge," no checks ever bounced on Globe Leasing's account prior to

July 15, 1975 [sic]. Mr. Weigelt said that he has never received any notice of overdraft or returned check. (TR 65-66)

Mr. Weigelt testified that he did not sign the name of Donald Hildreth to a motor vehicle lease dated October 25, 1973, nor did he ever ask anyone to sign that name. He further testified that at the time the lease was entered into, Donald Hildreth was residing in California and the lease was hand carried from Salt Lake to L.A. (TR 66)

Mr. McRae then asked Mr. Weigelt to give the history of his financial situation since July 15, 1974. Mr. Kipp objected as not being material because not related to damages. Mr. Kipp further pointed out that Globe Leasing made a claim that their rights were somehow abridged by the actions of the Bank and bad things happened to the company, and they therefore are entitled to be compensated for damages. Mr. Kipp explained this further by saying:

> That's before your Honor; that's the company's claim. They're the only people with relationship with the bank. Now Mr. Weigelt, and now Mrs. Weigelt have--I think both; at least he--had separate claims sounding in slander. In connection with his--I fought it up until today--claims made by Mr. Parker that were derogatory, they have no claim except claims individually for some wrongful act by the bank on Globe, a corporation, and assert another claim for the same loss that the corporation has because they're shareholders. The corpora- had made that claim and they will benefit as shareholders if the corporation benefits. The only claim to be made on the contractual relationship with the bank and the financing and

running of the lease business is a corporate claim.

The Court and Mr. McRae agreed with Mr. Kipp and Mr. McRae stated that he did not intend to offer any evidence on the last cause of action. (TR 66-69)

The Court dismissed the claim against Mr. Parker as it relates to the count alleging slander; the sixth cause of action. (Tr Vol. 1 at 69-70)

CONTINUED DIRECT EXAMINATION OF MR. WEIGELT BY MR. McRAE:

Mr. Weigelt again testified that the amount of monthly payments made to the Bank on each lease was equal to the amount that Globe collected from the lease. Mr. Weigelt was asked, in capitalizing out the cost of the car plus a markup that he charged to the customer on the purchase of the car, and in paying the amount of the monthly lease as calculated by the interest he charged the customer, what the net result was in applying those payments towards the lease period insofar as it bears on the residual due at the end of the lease. Mr. Weigelt explained that he had the residual on Page 1, which is applicable to the lease agreement between the lessee and Globe. He also repeated that with regard to the calculations made with Globe and the Bank, that by rendering a complete payment to the Bank, Globe's position was enhanced at the customer's lease end so that Globe would credit more each month toward that residual. (Tr Vol. 1 at 70-71)

Mr. Weigelt's next testimony was that after the Bank terminated Globe's financing and took over the leases, Mr. Weigelt visited with Mr. Varos at Walker Bank and Mr. Bettinger at Commercial Security Bank. Mr. Chaney knew both of these individuals at Continental Bank and Trust and First Security and discussed a program with a man at Zion's. He testified further to having covered Tracy Collins and "thinking" that he had met with Larry Benson at Valley Bank. Mr. Weigelt testified that he presented these respective bank officers with what he considered to be Globe's Bible on the format as well as presenting computer runs and financial statements from Globe's operations. He testified that at the time, Globe had no cash flow at all and that he told this to the bank officers. Mr. Weigelt stated that he had familiarized himself with banking circles of the community in the months of July and August, 1974. He said that the "situation" with the Bank of Salt Lake was a matter of common knowledge. However, he also testified that he encountered this "common knowledge situation" at only two banks and that he had to explain the impounding of Globe's accounts. Mr. Weigelt said that Globe was never able to obtain any other source of financing after the actions of the Bank on July 15, 1974. (Tr Vol. 1 at 71-73)

Exhibit 24-P was received into evidence. The exhibit is a copy of a credit advice covering a wire trans-

fer for $3,500 to Globe Leasing from the Bank of Salt Lake. Mr. Weigelt testified that this applied to a prospective lessee by the name of Donald L. Hildreth. He said that Bank of Salt Lake had advanced $8,000 to Globe on a Hildreth lease of a 1973 Continental Mark IV. He recalled that in the fall of 1973, Mark IV's were selling poorly and that Globe was the owner of the car which was being used at the time as a company car. He testified that Globe Leasing entered into a "lease arrangement" with Mr. Hildreth which was "not necessarily good" and was entered into by Globe because of the type of vehicle, the market conditions and the gas crunch. He testified that "originally" the Hildreth lease was drafted and computed for 24 months at about $250 a month plus tax and that he had someone in the building named Glenn, hand carry the lease and drive the vehicle to California. He stated that Globe was supposed to receive a security deposit and other funds pursuant to that particular agreement. Mr. Weigelt testified that he received another call from Mr. Hildreth and that subsequently another lease was prepared. That lease he said, was to be a prepaid lease at a fixed amount covering the 24 months. He testified that there was "some consideration for a Cadillac automobile" with respect to this lease. Globe eventually got the Cadillac and, testified Mr. Weigelt, was unable to sell it because it was a big car and that small cars were

then in demand. He testified that if Globe had continued in business, they would have made the balance of payments on the Hildreth lease. He further testified that the Cadillac was repossed by the Bank of Salt Lake from his home as one of the items for which they held title. (Tr Vol. 1 at 73-75)

Mr. Weigelt testified again that he has been involved in the rental of cars for over 15 years and that he considers himself knowledgeable in that business. Mr. Weigelt testified also that he believes that he ran Globe Leasing in a good businesslike fashion for that type of business. (Tr Vol. 1 at 75-76)

At the end of 1973, Globe Leasing received printouts from the Bank of Salt Lake pertaining to interest. Those printouts were used in preparation of the 1973 Globe Leasing tax return. The interest charged to Globe was applied as an operating expense. At this point, Mr. McRae asked the Court for a ruling on the parol evidence question the Court had under advisement. The Court denied the use of parol evidence. (Tr Vol. 1 at 76-77)

CROSS-EXAMINATION OF MR. WEIGELT BY MR. KIPP:

Mr. Weigelt's tax return was in his CPA's office. Mr. Kipp asked that that tax return be produced. (Tr Vol. 1 at 77)

Mr. Weigelt testified that he was aware of leasing companies which had not made money and which had "gone broke." He stated that it's a competitive business, much like the finance business. (Tr Vol. 1 at 77-78)

Mr. Weigelt stated that the calculations he testified to at great length during direct examination are really the basic interest calculations that finance companies, banks, and money lenders make daily in connection with loaning money. He testified that what he does is try to figure out what the money is going to cost him and does a markup so that he can make a profit and produce a lease payment. He considers how much money he has to get the car, what it's going to cost him to get it, what the car is going to be worth at the end of the deal, and what his profit is going to be. (Tr Vol. 1 at 78)

Exhibit 18-P is a summary of Mr. Weigelt's files and some accounting materials. Mr. Weigelt testified that in making the calculations on this exhibit to determine what Globe's profit would have been, he considered the total amount the lessee was going to pay and what the car would be worth at the end of the deal (residual value). Included, as other factors, are vehicle cost, interest and taxes. He testified that to determine the residual value of the car at the end of the term, he had to make an educated guess based on market data. The residual value

he said, is also what the car can be sold for at the end of the lease term. In some instances he took a presentable, round number payment, and figured back to get down to a residual. That figure he stated, would be less than the Kelly Blue Book. (Tr Vol. 1 at 78-83)

Mr. Kipp directed Mr. Weigelt's attention to Lease No. 58, Hallman, a 1971 Volvo automobile on a three year term. The Blue Book showed the Volvo at $1,850. Mr. Weigelt had the Volvo valued at $2,269. Mr. Weigelt explained that there may have been additions on some of the lease documents for additional equipment such as air conditioning to arrive at that figure. He answered a query about reconditioning costs by stating that the deductions for reconditioning costs on the Volvo were minimal. Mr. Weigelt then agreed that it is true that the Blue Book figures are figures on a car in marketable condition, and that costs of restoration to marketable condition must be deducted from the figures. He then testified that the figures on the Volvo in the lease documents don't conform to the Blue Book but are only a guide. Mr. Weigelt further admitted that it was true that in many cases the figures were adjusted in a variety of fashions in order to end up with a lease "that he could make" because the lease business is competitive. Profit in the leasing business, testified Mr. Weigelt, would be dependent upon the value of the

vehicle at the end of the lease term. If the vehicle was worth less than was calculated for a residual, a loss would result. (Tr Vol. 1 at 83-85)

Mr. Kipp directed Mr. Weigelt's attention to the first lease, Richter-Robb, a total vechicle cost of $3,883.74, 24 month lease, residual value of $1,599, "less than half" of the purchase price. Mr. Weigelt explained that this shows the broad variations in residual values. With reference to the lease computation work sheet contained in the Richter-Robb file No. 1, Mr. Kipp pointed out that No. 8 says, "Estimated Wholesale Value at Lease Termination, $1,925.00". No. 9 says "Safety Factor (Adjustment Back of Book)." The safety factor was $325.52 for reconditioning leaving a residual value of $1,599.48. Mr. Weigelt testified that the document with that figure was presented to the Bank in order to have them take the lease. Mr. Weigelt testified that the Motor Vehicle Lease Work Sheet contained in file No. 1 is Globe's "internal" work sheet. He also stated that he didn't know how the Bank got that form because that form was used for Globe's "own purposes" and "not to give information to the bank." The work sheet from file No. 1 was marked as Exhibit 25-D. Mr. Weigelt was unable to find one of the internal work sheets in file No. 21. Mr. Weigelt testified that it is possible that the rest of the internal work sheets were

destroyed and not retained in his file. He testified that they did not differ from the work sheet given to the Bank. He said further, that sometimes Globe would make up ten of those internal worksheets before coming up with the final calculations. The "internal work sheet" in file No. 1 indicates a residual of $2,262 while the Bank was told that there would be a residual of $1,599.48. Exhibit 25-D was received into evidence (Tr Vol. 1 at 85-89)

At this juncture, Mr. Kipp began extensive questioning concerning the circumstances surrounding the Hildreth transaction. He requested that Mr. Weigelt find the Hildreth file and extract therefrom the lease which had been "sold or financed or assigned or whatever" to the Bank. Mr. Weigelt complied and the result of the exchange between Mr. Kipp and Mr. Weigelt was substantially as follows:

That there had been, in fact, another lease executed by Mr. Hildreth on terms very different from those which were in lease No. 02802-01-01. The latter lease was assigned to the Bank in exchange for a sum of $8,546.11 which, Mr. Weigelt testified, was expended by Globe for business expenses or other lease payments. Mr. Weigelt testified that Globe did not know what happened to the former lease although it was taken with the Mark IV automobile which was the subject of the lease to California. He also testified that though he did not know what happened

to the lease, "we know it was executed, but not received ultimately by us." Further testimony was that this lease unlike lease No. 9802-01-01 which was assigned to the Bank, was for a fixed amount of $3,500 which was prepaid by Mr. Hildreth by wire from his bank to the Bank of Salt Lake for Globe's account. Further that Mr. Weigelt "believes" that he acknowledged in writing on that lease, which he never saw after it was taken to California for execution by "Glenn Somebody", the $3,500 prepayment. All that notwithstanding, Mr. Weigelt also testified that Glenn brought a Cadillac titled to Donald Hildreth back from California for which there was some discussion, by phone, with Mr. Hildreth to the effect that a deal taking the $3,500 and his Cadillac to "wash out the Mark IV could not be done because" of the tax implications on Mr. Hildreth's part.

Mr. Weigelt continued and testified that their lease No. 0802-01-01 was drawn up and sent back to California with Glenn which later came back into the hands of Globe and was assigned to the Bank for $8,546.11 nothwithstanding Mr. Weigelt's testimony that the lease 01-01 was "not a real deal" and that Mr. Hildreth was not bound by the terms of that lease and further that he did not owe some $8,000 as specified therein. Mr. Weigelt testified that he knew that the Bank would and did rely upon the terms of that non-binding lease to advance funds of $8,546.11 to

Globe. Yet, de did not advise the Bank of the bogus nature of that lease, of the existence of the original fixed amount lease, or of the $3,500 prepayment thereon. Whereupon, the Hildreth file was marked as exhibit 26-D and admitted into evidence. (Tr Vol. 1 at 89-104)

Mr. Weigelt was then questioned about an earlier example of a lease transaction with the Bank in which a car would be purchased for $5,000 and $5,500 would be borrowed from the Bank. Mr. Weigelt stated that the Bank would credit Globe's account with $5,350. At the same time, the deal would be made with the lessee. The lessee would sign the lease and get "title" to the car. According to Mr. Weigelt, the signing of the lease consummated the deal and the lessee would then make a payment to Globe which included a security deposit and the first monthly rental payment. Mr. Weigelt testified that after this was done, Globe would have the $5,350 from the Bank, the first month's lease payment from the lessee, and the security deposit from the lessee. He agreed that as a result, Globe could receive more than $5,500 in cash for its purposes, a sum in excess of the $5,000 car cost. Mr. Weigelt stated that Globe would use this cash to operate and if Globe didn't keep making deals, it had no cash flow. (Tr Vol. 1 at 104-106)

Mr. Weigelt then testified that he had no cash flow when he went to the Bank of Salt Lake and that before

he made the arragnement with the Bank of Salt Lake, he was unable to get financing anywhere else. He stated that he found himself in the same situation when he was terminated by the Bank of Salt Lake. (Tr Vol. 1 at 106)

Mr. Weigelt's testimony was that the security deposit was a sum paid to Globe by the lessee to insure that the car would be returned in good condition. If the car were returned in good condition, the lessee was to get the money back. Mr. Weigelt stated that in the leasing industry one is always collecting security deposits. The mode of operation, he testified, would be to collect today's deposits, expend them, and use tomorrow's deposit to repay the security deposit when the first lease ended. (Tr Vol. 1 at 106-107)

As a result of the Hildreth transaction, Globe ended up with the Cadillac. It took title to that car and then put the title in Globe's name. The car was thereafter financed at the Bank and the title was pledged on the loan. At that time, the Bank of Salt Lake had already loaned Mr. Weigelt money to Globe on the Hildreth transaction the proceeds of which had produced the Cadillac for Globe. Mr. Weigelt testified that he spent the money Globe received from the Cadillac loan and made monthly payments on the Cadillac. This loan was not paid off. (Tr Vol. 1 at 107-111)

File No. 25 in the files of Globe Leasing relates to a 1974 Pointiac Grand Prix. Mr. Weigelt testified that he borrowed money on that automobile from Valley Bank and Trust Co. and pledged the title to them. He thereafter entered into some financing arrangement with the Bank of Salt Lake on that same car. Mr. Weigelt explained that Globe pledged a lease on that car and went through the normal situation with its financing on a normal lease. The lease was to Gold Bar Resources. Mr. Weigelt stated that Globe was unable to deliver the title to the Bank of Salt Lake because it was already previously pledged at Valley. Mr. Weigelt testified that he failed to disclose to the Bank of Salt Lake the fact that the car was already pledged when he assigned that lease because "he didn't know it was." He said however, that he knew he pledged it to the Bank of Salt Lake but "didn't realize" that Globe had not consummated and paid off Valley Bank. Mr. Weigelt stated that he could have gotten the title from Valley by paying them off. He agreed that the Bank of Salt Lake might not have loaned Mr. Weigelt the money had he told them that the vehicle was previously pledged to Valley. He explained that he didn't tell Valley that he was borrowing money against the same vehicle from the Bank of Salt Lake because he was anticipating paying it off like he had done before. Mr. Weigelt, however, admitted that the vehicle was double

financed. He further agreed that no bank "in its right mind" would stand still for that. Mr. Weigelt claims that he didn't know he was arranging the double finance at the time that it was set up. (Tr Vol. 1 at 111-115)

According to Mr. Weigelt, it was the practice of Globe and the Bank to have Globe approve credit and then have Mr. Perry also approve credit before leases were taken to the Bank to be assigned and before Globe received any money. He concurred that during the course of Globe's dealings with the Bank, a good many proposed leases by Globe, were not approved by the Bank. Mr. Weigelt estimated that a third of the leases proposed by Globe were not approved by the Bank for credit risk reasons. (Tr Vol. 1 at 115-116)

Mr. Weigelt testified that he discussed the first lease to Leisureamerica with Mr. Perry and that Mr. Perry responded favorably to it. Thereafter, the lease was proffered to the Bank and the Bank credited Globe's account. Mr. Weigelt claims that he talked with Mr. Perry about almost every other lease to Leisureamerica. He explained that Mr. Perry approved the credit of Leisureamerica when the first lease was submitted to the Bank. Mr. Weigelt testified that he told Mr. Perry at the time of the first Leisuramerica lease that many vehicles would be leased to that entity. Mr. Weigelt stated additionally that he

would discuss new lease transactions with Nicki Davis, that he spoke with her about some of the Leisureamerica leases and that she approved the credit of Leisuramerica in some cases. Mr. Weigelt was aware that Leisureamerica owned a thousand acres of land in Idaho and other property in Utah. He stated that he wasn't aware that Leisureamerica eventually went out of business. (Tr Vol. 1 at 116-119)

Mr. Weigelt explained that when Globe Leasing was formed, $9,000 worth of stock was issued at 25 cents a share and that although Globe incorporated with 50,000 shares, only about 35,000 shares were actually issued. He testified that some of the shareholders paid 25 cents a share and some did not and that the actual capital of the company was about $3,000. On his personal financial statement, Mr. Weigelt indicated that his net worth was under $10,000 and that the net worth on Gloria Weigelt's personal financial statement was under $5,000. He admitted that with that capital structure, they got involved with the Bank for almost $400,000 worth of leases on which the profitability or unprofitability was largely dependent on the accuracy of his own predictions of values of vehicles at the end of a lease. He testified that Globe operated for about a year and had an actual operating loss of about $1,800. The financing arrangement with the Bank he said was confirmed by a letter (Exhibit 8-P) written by

Mr. Perry at Mr. Weigelt's request. He further testified that arrangement set forth in the letter was never amplified or amended in writing. He said that he relied on the letter in his dealings with the Bank. Mr. Weigelt testified that he had discussed with Mr. Perry the fact that Globe was relying on Bank of Salt Lake as the sole source of its financing and that Mr. Perry never indicated that Globe was going to be cut off. (Tr Vol. 1 at 119-122)

Mr. Weigelt testified that in his original attempts to find financing for Globe, only two lending institutions evidenced any interest in his business. He stated that those two were not interested at the time because of insufficiency of funds. Mr. Weigelt stated that when Bank of Salt Lake terminated Globe, he ran into the same problem only worse. (Tr Vol. 1 at 122-123)

Mr. Weigelt stated eariler that all lessees were current with Globe as of July 17, 1973. His testimony at this point was that he is not sure that they were all current and that there may indeed, have been some delinquencies at that time. He testified that Globe had a procedure whereby delinquent notices were sent to lessees and that they had to institute other collection procedures in some instances in order sometimes to collect payments that were past due. Mr. Weigelt then claims that there was no reason to tell the Bank that the lessees were delin-

quent in their payments because he was current with the Bank as a result of the regular drafts on his accounts. (Tr Vol. 1 at 123-124)

When Mr. Perry (sic) refused to finance the last three leases of Globe Leasing, Mr. Weigelt called his attention to the letter written by Mr. Perry which indicated that written notice was required before the financing of leases could be discontinued. Mr. Weigelt agreed that thereafter the Bank accepted assignments on the last three leases and ultimately duly credited the Globe account with the proceeds. (Tr Vol. 1 at 124-125)

Mr. Weigelt testified that the fact that leases were financed or assigned was written in the lease and that if the lessee read the contract, he would be aware of that fact. According to Mr. Weigelt, it's standard practice to borrow money on leases. He testified further that he wouldn't expect lessees to be offended to learn, then, that a bank had financed their deal. (Tr Vol. 1 at 125-127)

Mr. Weigelt stated that he did not believe that a promissory note was ever consummated on any of the Globe lease transactions. He further admitted that funds credited to Globe's account on the leases were not on the basis of any promissory notes and that his earlier testimony referencing promissory notes really had no relationship to

Globe's deal with the Bank. (Tr Vol. 1 at 127-128)

Mr. Weigelt estimated that the security deposits received by Globe on its leases totalled some $11,000. Those funds according to him, were expended by Globe. (Tr Vol. 1 at 128)

He explained that Globe has no assets and that it is closed. Further, he volunteered that he and Mrs. Weigelt are in bankruptcy. (Tr Vol. 1 at 128)

Mr. Weigelt testified earlier that he issued checks to the dealers and that they took them to the Bank to cash them. Mr. Weigelt agreed, upon questioning, that this is a little unusual. He admitted being familiar with the term "hammer a check" and agreed that this phrase describes a situation where one individual is worried about another individual's financial situation, and upon receipt of a check from that individual, goes directly to the drawer bank to cash the check. Mr. Weigelt admitted that the dealers felt this way about his financial situation on the three specific occasions related to the final three leases for which the Bank advanced funds. He also admitted that this was before any action had been taken by the Bank with respect to dealers or the public. (Tr Vol. 1 at 128-129)

Roger Segal was Mr. Weigelt's attorney at the time of his initial conversations with Bank of Salt Lake. (Tr Vol. 1 at 129)

In his many years in the car business, Mr. Weigelt testified that he had occasion to deal with financial institutions and that he is aware that banks have loan limits under applicable state statutes. He was also aware that banks are under the supervision of a state department and that they have a duty to make reports to that department as well as be subject to audit by that department. Mr. Weigelt agreed with the proposition that more money is available from big banks than small banks. (Tr Vol. 1 at 129-130)

According to Mr. Weigelt's testimony, the reserve account at Bank of Salt Lake was set up a his request. He stated that the dispute with respect to this matter concerns whether or not the Bank had the right to take the money after the financing was discontinued. Mr. Weigelt agreed that he didn't ask for a checkbook on this account and didn't ask that it be put into an interest bearing account. (Tr Vol. 1 at 130-131)

In addition to the operating account and the small reserve account at the Bank of Salt Lake, Mr. Weigelt testified that Globe also had a checking account at Valley Bank and Trust for the purpose of having separate funds that would not be known to the Bank of Salt Lake. Mr. Weigelt stated that from time to time he made financing arrangements with Valley. (Tr Vol. 1 at 131)

Mr. Weigelt agreed that banking practice requires original verification of insurance of some form on financed vehicles and that the required insurance for licensing a vehicle is liability coverage only. He admitted, however, that, the Bank was concerned with insuring physical damage on the vehicle to insure that their security would be maintained. Mr. Weigelt stated that he did, in fact, deliver some policies to the Bank. (Tr Vol 1. at 131-132)

At one point stated Mr. Weigelt, Mr. Perry questioned the practice of the Bank advancing to Globe an amount more than the cost of the car. Mr. Weigelt testified that he didn't think this practice was unusual, but did agree that ordinarily a lending institution wishes to take security which has a greater value than the amount of its loan. (Tr Vol. 1 at 132)

Mr. Weigelt again admitted that about a third of Globe's proposed leases were refused by the Bank of Salt Lake. (Tr Vol. 1 at 132)

Exhibit 27-D is a letter from Mr. Kipp's office to Roger S. Segal with the voucher portion of a check attached. The letter confirms an arrangement whereby, upon delivery of titles to the Bank, checks drawn by Globe in payment for the vehicles covered by the last three pending leases would be honored. Mr. Weigelt agreed that this was the arrangement which was initially set up. He stated however, that ultimately these leases were handled in the same manner

as the previous leases, ie., Globe's account was credited and checks were drawn payable to the dealer with no conditions of any kind imposed to assure the Bank that the title would be forthcoming. Exhibit 27-D was received into evidence. (Tr Vol. 1 at 133-134)

REDIRECT EXAMINATION OF MR. WEIGELT BY MR. McRAE:

With reference to the last three leases, Mr. Weigelt testified that credit advices were subsequently cancelled under the direction of Mr. Parker. He explained, however, that after some negotiations, the account was recredited. (Tr Vol. 1 at 134-135)

With respect to the $1,800 operating loss, Mr. Weigelt testified that deferred income was not taken into consideration when the financial report was made up and that account depreciation credits were not considered either. According to Mr. Weigelt, "account depreciation" is one of the incentives for a person to get into the leasing business. (Tr Vol. 1 at 135)

Mr. Weigelt claims that he never had any knowledge about the Bank of Salt Lake's loan limits to an individual customer until the Bank discontinued Globe's financing. He also claims that none of the officers ever told him anything about the loan limit. (Tr Vol. 1 at 135-136)

Mr. Weigelt testified that he first became aware

that the Bank of Salt Lake didn't receive title to the double-financed Pontiac at Valley when he received a letter from the Bank on August 4, 1974. He stated that, upon receipt of the letter, he searched his file and then advised Valley Bank that he was going to pay off the balance owed on that account in order to obtain the title. Mr. Weigelt stated that he did, in fact, tender his payment to Balley Bank at the time this lawsuit commenced. (Tr Vol. 1 at 136-137)

Mr. Weigelt testified that Globe never received any of the funds back that were deposited in the Bank of Salt Lake. Funds from both of the accounts were impounded by the Bank . (Tr Vol. 1 at 137)

According to Mr. Weigelt, not all leases are figured in the same way (Tr Vol. 1 at 137) and that the NADA and Kelly Blue Book give average wholesale and retail prices of vehicles. (Tr Vol. 1 at 138)

The security deposit, testified Mr. Weigelt, was an amount held by Globe so that when the lease was terminated, any deficiency could be resolved with the application of that deposit. (Tr Vol. 1 at 138)

Exhibit 24-P is a credit advise bearing a lease No. of 0802-01 (the Hildreth lease assigned to the Bank was No. 0802-01-01) saying that $3,500 had been credited To Globe's account. Mr. Weigelt testified that Mr. Hildreth agreed to wire a bank transfer of $3,500 from his bank to the Bank of Salt Lake rather than sending Globe a check.

He testified further that the $3,500 was not received against the $8,000 advanced on the Hildreth lease. Rather, Globe made payments on the Hildreth lease from November of 1973 through August or September of 1974. (Tr Vol. 1 at 138-139)

According to Mr. Weigelt, there was an opportunity on net leases to derive additional income. He explained that normally, a net lease would have a residual lower than the current market of the vehicle. When the leasing company would get a vehicle back under a net lease, it would sell it for the best possible price, and would pay off the financial institution involved with those proceeds. Mr. Weigelt then explained an open-end lease as follows:

> "Open-end lease is one where the sale of the vehicle is less than the residual with the leasing company -- lessee obligated to make up that difference. And in this case the security deposit can be applied, or if the vehicle is sold in excess of the residual value on the lease with the leasing company that money is refunded to the lessee plus the return of the deposit."

He testified that the gain to the leasing company on an open-end lease would be based on the difference between the payoff on the lease versus the payoff that the leasing company would have with the Bank. Normally, he explained, the payoff at the Bank would be a lesser amount and that, further, the company would also benefit from the higher capitalized cost. Mr. Weigelt testified that

these are "standard practices" within the auto leasing business. (Tr Vol. 1 at 139-141)

Mr. Weigelt testified that prior to July 15, 1974, he received no notification from anyone at the Bank, orally, or in writing of any claim of default in any of Globe's dealings with the Bank. (Tr Vol. 1 at 141)

Exhibit 19-P contains the motor vehicle security agreements on leases 1 through 64. Mr. Weigelt testified that these security agreements along with the assignment of lease, were signed by Globe to evidence a promise to repay money to the Bank. (Tr Vol. 1 at 141-142)

RECROSS-EXAMINATION OF MR. WEIGELT BY MR. KIPP:

Mr. Weigelt agreed that in a net lease, if the car is worth less than the balance, Globe would have to make up the loss. (Tr Vol. 1 at 142)

He also agreed that the credit advice on the $3,500 wire transfer was for the missing Hildreth lease and not for the lease which was assigned to the Bank. (Tr Vol. 1 at 143)

He admitted that, as of July 1974, the security deposits, which were paid in by lessees to assure that the cars returned were in good repair were spent. (Tr Vol. 1 at 143)

He also admitted that the Bank of Salt Lake ended up paying to Valley Bank the outstanding balance of Globe's obligation to Valley in order to get the car title. Mr. Weigelt testified that he never instituted any proceedings to recover any money that Valley wrongfully took from him. (Tr Vol. 1 at 143)

END OF EXAMINATION OF MR. WEIGELT:

Exhibit 28-D was received into evidence. Exhibit 28-D contains Globe's income tax return identified as being for the period March 2, 1973, with attached schedules. No return was filed for an ensuing period because the company ended up going out of business. The return shows, among other things, a taxable income of minus $1,986 for that period. (Tr Vol. 1 at 144)

DIRECT EXAMINATION OF DONALD L. HILDRETH BY MR. EYRE:

Donald L. Hildreth, 4996 Paseo Segovia, Irvine, California, testified to having resided in the California area for about six years. He stated that he owns a real estate development brokerage and is the vice president of Mission Viejo Company. He received a degree in Education from Arizona State University of Tempe, Arizona. (Tr Vol. 1 at 145)

Mr. Hildreth testified that he first became acquainted with Mr. Weigelt in late September or early October

of 1973. His first contact with Mr. Weigelt was initiated through his son-in-law and was by telephone. Mr. Hildreth contacted Mr. Weigelt to confirm a proposition which had been made to him via his son-in-law concerning the lease of a Mark IV 1973 automobile. Mr. Hildreth testified that his son-in-law is Glenn Hadley II and that Glenn worked for AFCO Development Company which was officed next door to Globe Leasing. Mr. Hildreth explained the substance of his conversation with Mr. Weigelt and the arrangement as follows:

> "I made notes, which I normally do concerning things of this nature. It was to be a 1973 Mark IV Silver Edition, which had all items of equipment on it with the exception of sun roof. It did have some mileage on it; had been used slightly. As I recall, it was stated or represented to me that the car had been in the leasing company's possession for approximately a month. The lease was to be $145 a month plus tax and a licensing fee, which was to be prepaid for two years, 24 months, which amounted exactly to $3,500."

Mr. Hildreth decided, thereafter, to accept Globe's proposition as it sounded attractive to him. He communicated that acceptance to Mr. Weigelt and, as a result, a lease document was drawn up and forwarded to Mr. Hildreth in California. The terms of that document conformed to the terms of the proposal made by Mr. Weigelt. He testified that the lease was mailed to him for signature and then returned to Globe. Exhibit 29-D contains a copy of

the lease signed by Mr. Hildreth. Mr. Hildreth further testified that at the time he signed it, it didn't have the notation on it "Paid in Full, A.B. Weigelt, President, 10-26-73." Pursuant to his conversation with Mr. Weigelt, Mr. Hildreth testified that he had his bank send the payment of $3,500 due under the terms of the lease to Globe's account at Bank of Salt Lake. This was done prior to the time that the automobile was delivered to Mr. Hildreth. After the transfer of funds was made, Mr. Hildreth's daughter drove the car to him from Salt Lake from California. Exhibit 24-P is the credit advice to the account of Globe Leasing for $3,500. Exhibit 29-D was received into evidence. (Tr Vol. 1 at 145-149)

In his conversations with Mr. Weigelt, Mr. Hildreth discussed the sale of an automobile owned by him to Globe. The car was a 1970 Cadillac Coup Deville. Ultimately, testified Mr. Hildreth, he entered into an agreement with Globe to sell that automobile. Mr. Hildreth was paid $2,500 by Globe for the Cadillac. Mr. Hildreth's daughter drove the Cadillac from California to Salt Lake City on behalf of Mr. Hildreth. (Tr Vol. 1 at 150)

Mr. Hildreth then testified that he began receiving correspondence from the Bank of Salt Lake concerning his lease in June or July of 1974. Exhibit 21-D

contains a letter dated July 15, 1974 to Donald L. Hildreth from the Bank of Salt Lake concerning the lease. Mr. Hildreth recalled receiving the letter. Mr. Hildreth then identified a note he had written on the letter which reads as follows: "July 22, 1974, Gentlemen, Above referenced lease was prepaid in full at the time of execution. No additional payments are due. Very truly yours, Donald L. Hildreth." Mr. Hildreth testified that he wrote that note on the letter and returned it to the Bank. (Tr Vol. 1 at 151-152)

Exhibit 21-D contains a document entitled "Motor Vehicle Lease No. 0802-01-01" dated October 25, 1973 in the sum of $8,546.11. The terms are different than the lease which is Exhibit 29-D. Mr. Hildreth testified that the signature in the lower left-hand corner of the Motor Vehicle Lease contained in Exhibit 21-D was not his and that the first time he had ever seen that lease was when the Bank sent him a copy and he turned it over to his counsel. Exhibit 21-D contains an "Affidavit of Forgery" dated January 9, 1975. Mr. Hildreth signed the affidavit before a notary public on the date it bears. The terms of the Motor Vehicle Lease bearing a signature which was not his were a complete suprise to Mr. Hildreth. Mr. Hildreth testified that he had discussed the lease with Mr. Weigelt

had then asked him if he didn't recall that his authorizing Mr. Weigelt to sign something for the Bank for Mr. Hildreth. Mr. Hildreth testified that he told him, "No I don't." Mr. Hildreth explained that as a rule, he never allows anyone to sign his name to anything which he has not carefully reviewed. Mr. Hildreth denied authorizing Mr. Weigelt to sign any documents in the lease transaction with Globe on his behalf. (Tr Vol. 1 at 152-154)

Mr. Hildreth recalled that after he received correspondence from the Bank, he called Mr. Weigelt to ask him what was going on. Mr. Weigelt told Mr. Hildreth that the Bank had changed personnel and had fouled his accounts up and indicated that he was investigating a lawsuit. He further instructed Mr. Hildreth to send anything he received from the Bank to him and Mr. Hildreth complied with that instruction. Mr. Hildreth also recalls that Mr. Weigelt asked that he not correspond with the Bank directly. (Tr Vol. 1 at 154-155)

The lease contained in Exhibit 29-D is the $3,500 lease which Mr. Hildreth signed and returned to Weigelt for a document indicating that the $3,500 lease had been prepaid and that he subsequently received a copy of the lease with Mr. Weigelt's signature and handwriting at the top indicating that the lease was paid in

full. Mr. Hildreth also received through the mail from Globe an authorization to purchase.

END OF EXAMINATION OF MR. HILDRETH.

AUGUST 5, 1976

DIRECT EXAMINATION OF FRANK K. STUART BY MR. McRAE:

Frank Keith Stuart, CPA and economist, graduated from the University of California in Berkeley in 1954 with a B.S. degree. Upon graduation, he took a position with Haskins and Sells and worked in San Francisco for a year doing auditing work. He returned to the University of California and entered their Ph.D. program, where he remained until 1960. He was appointed as a faculty member at University of California at Berkeley. In 1960 he accepted a position as Assistant Professor at the University of Utah in Salt Lake City. Then in 1961, he was appointed Assistant Director of the Bureau of Economics and Business Research at the University of Utah. Then from 1964 to 1968, he acted as President and General Manager of the Freeport Distribution Center in Clearfield, Utah. During this time, he maintained his teaching positions at the University of Utah, Brigham Young University and Weber State College in the extension division. He currently teaches economics, accounting and finance, and statistics at Brigham Young University's extension division. From 1968 to 1974, Mr. Stuart was in charge of the management service department at Elmer Fox and Co., a national CPA firm. In 1974, Mr. Stuart established his own consulting practice. In February of 1976, he merged with National Economic Research Associates headquartered in New York City, an economic and financial consulting firm with other offices

in Philadelphia, Washington, Los Angeles and Salt Lake City. (Tr Vol. 1 at 156-157)

Mr. Stuart has been qualified and testified before the Interstate Commerce Commission, the Federal Power Commission several public service commissions in various states, and the Federal Courts in Utah, Nevada, California, Pennsylvania, Illinois, Colorado, in all of the district courts in Utah, and numerous other state and local courts. (Tr Vol. 1 at 157-158)

Mr. Stuart briefly summarized the general character of microeconomic and macroeconomic theory, his specialties. (Tr Vol. 1 at 158)

Mr. Stuart's firm has currently been retained as an expert and Mr. Stuart is working on the case of Memorex vs. IBM, a large anti-trust case filed in San Francisco. Mr. Stuart is also currently working on the Consolidated Sugar cases. (Tr Vol. 1 at 158-159)

Mr. Stuart is acquainted with the leasing industry and the automobile industry. He was involved with this type of work at Haskins and Sells and Elmer Fox. He has "taught in the field of leasing" and has been a member of the AICPA's committee on leasing practices. He has been involved in litigation where leasing operations were peripheral to the main operations. Mr. Kipp objected to this. The fact that another court has qualified him is not helpful to this Court. The objection was sustained. (Tr Vol. 1 at 159-160)

Mr. Stuart is familiar with the leasing businesses of Evanston Motors in Illinois and Randy's Datsun, Colonial Ford and Larson Ford in Salt Lake City. He has had occasion to study the books and records of these companies and formed opinions on the value of these companies. He has also evaluated about five automobile businesses. (Tr Vol. 1 at 160-161)

Mr. Stuart has been involved in the economics of business management and has expertise in the field of analyzing business management and business practices. Mr. Stuart's field of emphasis in his Ph.D. program was Economic Theory, Business Finance and Operations Research, which is the mathematical application to business problems and accounting. Mr. Stuart has worked very closely with banks on a number of occasions. He has been called as an expert "with respect to whether or not business loans should be made or the operational and business characteristics of certain firms". He has also been "involved in the evaluation of business enterprises from the standpoint of termination of business relationships".

Mr. Stuart explained how he evaluates management performance as follows:

> "We have a standard management audit that we use. There are 19 specific tasks that we look at that are organized into four broad categories. Those four broad categories are planning, organizing, directing and controlling." (Tr Vol. 1 at 162)

At the request of Mr. McRae, Mr. Stuart conducted an inspection of Globe Leasing Corporation. He began his inspection

in the spring or early summer of 1975. He had available to him the general ledger of Globe Leasing, their books of original entry, all of their basic documents, computer runs from the bank, bank statements, depositions, jackets with information on each of the leases such as the work sheets, cancelled checks for purchase of the car and other information. He also had certain accounting records prepared by Globe's accountant. He also reviewed the work sheets of the CPA to assist him in gaining a total understanding of the records. Mr. Stuart had the following exhibits available to him when he was going through the records: Exhibits 3-P, 22-P, 28-D, 19-P, 2-P, 7-P, 6-P, 5-P, 4-P, 20-P, 30-D, 24-P, 9-P and 8-P. He also examined the Kelly Blue and NADA Book. He also examined newsletters of the American Automobile Leasing Association, and other handbooks on leasing that are prepared by various services which explain leasing operations for would-be lessors and lessees. (Tr Vol. 1 at 161-165)

Mr. Stuart is familiar with the "money market in the banking industry". He also professes acquaintance with the economic aspects of the automobile industry as it cycles through from year to year. (Tr Vol. 1 at 165)

Exhibit 18-P was shown to Mr. Stuart. Mr. Stuart stated that he prepared the exhibit earlier in the week. He testified that in preparing this exhibit, he used his professional expertise, the publications he has mentioned, his

past experience and all of the records and exhibits alluded to earlier. Mr. Kipp objected to the use of Exhibit 18-P because it included depositions, the work sheets of the CPA, and further, because accounting records referenced were in addition to the accounting records before the Court. The conclusions were, therefore, not based on evidence before the Court and were not proper for the witness to testify about. Mr. Anderson argued the subject of damages. The Court stated that the objection on the grounds that the testimony may concern speculative damages was overruled but the objection as to foundation was well taken. Mr. McRae withdrew the witness from the stand and asked Mr. Weigelt to take the stand. (Tr Vol. 1 at 165-168)

REDIRECT EXAMINATION OF MR. WEIGELT BY MR. McRAE:

Mr. Weigelt stated that Exhibit 37-P contains separate folders on insurance for each vehicle lease, which were reviewed by Mr. Stuart in preparation for his testimony. Mr. Weigelt was shown a package of files marked Exhibit 38-P and identified them as six files labeled "Bancorporation Leasing", and various names, and another folder with a man's business card attached on the front. The leases, consummated by Globe in a broker capacity, were in the same form and style as the previous 64 leases identified as Exhibit 17. (Tr Vol. 1 at 168-170)

VOIR DIRE OF MR. WEIGELT BY MR. KIPP:

Mr. Weigelt stated that he was changing his previous testimony to identify some business done by Globe after July 15, 1974. Globe brokered the six leases in Exhibit 38 under Mr. Weigelt's name and the files had been in a box in Mr. Weigelt's home. Mr. Weigelt testified that the accountant's work sheets were not contained in Exhibits 37 or 38.

Bancorporation Leasing is a Salt Lake corporation engaged in the leasing business with funds to lease vehicles. Mr. Weigelt made the six leases in Exhibit 38 as an authorized agent of Bancorp Leasing and Globe received a broker's fee for those leases. That broker fee is indicated on the front page of the files. The dates on the front of the files are the dates of the transactions. Exhibit 37-P was admitted into evidence subject to later inspection of the contents. Also part of the exhibit were a summary of telephone conversations and certain depositions none of which were part of Globe's books and records. Upon removal of the telephone summary and the depositions, Exhibit 37-P was admitted. Exhibit 38-P was received into evidence. The Court overruled the objection to the testimony of Mr. Stuart subject to Mr. McRae laying a foundation as to the accountant's work sheets and a continuing objection on behalf of Mr. Kipp and his client. Mr. McRae stated that the work sheets were on their way to the Court. (Tr Vol. 1 at 170-177)

CONTINUED EXAMINATION OF MR. STUART BY MR. McRAE:

Mr. Stuart explained that Exhibit 18 is composed of a number of columns. The first column is the lease number that was assigned by Mr. Weiglet. The date is that which was assigned to the lease by Mr. Weigelt. Exhibit 18 includes all leases, 1-64. The type of lease is designated in the exhibit by either an "N" or an "O". Explained Mr. Stuart, "a net lease is a lease which terminates at the end of a lease, and the lessor takes back the vehicle and the lessee goes his way. An open-end lease has a minimum provision that the lessee must pay at the end of the lease; and if the vehicle is sold, any shortage must be made up by the lessee; any overage is returned to the lessee". Mr. Stuart explained the exhibit further:

> "The lessee is indicated in the next column. The term of the lease is indicated in the next column. Then there are some dollar amounts designated as Columns 1 through 6.
>
> The American Institute of Certified Public Accountants has reviewed the accounting for lessors and has determined a proper method for accounting for leases in financial statements. They basically take this form: Matched are the cash receipts that the lessor anticipates and the cash disbursements that the lessor anticipates. The cash receipts are indicated in Columns 1 and 2. Column 1 is the total of the lease payments according to the agreement between the lessor and the lessee. Column 2 is the residual value as determined by Mr. Weigelt. Column 3 is the total vehicle cost that had to be paid by Mr. Weigelt. Column 4 is the interest cost, and Column 5 are other incidental costs.

The amount of the net cash flow that Mr. Weigelt could expect from each of the leases would then be Columns 1 and 2, which are the total of cash received from the lessee, plus the anticipated residual value, minus what he has to pay for the vehicle, the interest cost to the bank and other costs.

The difference between Columns 1 and 2 on the one hand and Columns 3, 4 and 5 on the other hand is what is known in the trade as a gross profit. In accounting a certain amount of this gross profit is allowed to be realized each period, and in the financial statements that are in evidence--particularly with respect to the financial statement of May 31, 1974 (Exhibit 5-P), the amount of revenue taken into account from the time the business started nine months ending May 31, 1974, was $34,630."

Footnote 1 of Exhibit 5-P indicates that the financial statement were prepared on the financing method of the American Institute of CPA's for automobile lessors. That footnote goes on to say:

"Approximately 10% of the total deferred lease finance charge, which is the amount considered by management to represent the cost of acquiring the lease contract, is included in the lease finance charge earned. The balance of unearned lease finance charges is included in income on the rule-of-78 method."

Mr. Stuart explained the footnote as follows:

"This means that it's a method of allocating revenue more in the earlier years and less in the later years. Seventy-eight is the sum of the digits 1 through 12. So, twelve 78's would be recognized in the first month, eleven 78's in the second month, and so on. The rule-of-78 method really only applies to a method. The way of amortizing the income into revenues would be determined by analysis of each particular case.

The amount of the deferred revenue is shown on the balance sheet as "Deferred Lease Finance Charge" of $77,241, which indicates that the accountant, as of May 31, 1974, determined that Mr. Weigelt over the period of a lease had earned $77,000 plus $34,000 and chose to recognize $34,000 in the period up through May 31, 1974.

The adjusted gross profit, then, would be recognized by the accountant over the life of the leases in a rational and consistent manner.

However, the total amount earned by Mr. Weigelt is the total of the gross profit for all of the 64 leases of $37,514.62. How that would be recognized by the accountant is another thing, but in effect Mr. Weigelt again rated a cash flow of gross profit of that amount as a result of the 64 leases that he consummated." (Tr Vol. 1 at 177-180)

Mr. Stuart next testified that Exhibit 32-P is an attempt to use the latest available information to determine whether or not the residual values determined by Globe Leasing, specifically Mr. Weigelt, were correct. Mr. Stuart explained the processes he went through in preparing Exhibit 32-P as follows:

"We examined the Blue Book values. specifically we used the NADA dealers book to determine the average trade-in price at either the date of the termination of the lease or the latest NADA publication that's availabe for leases that have not expired at the time the calculation is made. We used the same method that Globe Leasing used had they set up the lease; that is, select a like vehicle and go back to the point in time when a like vehicle was originally offered for sale by the manufacturer to determine what its value was on the day of this calculation." (Tr Vol. 1 at 182)

VOIR DIRE OF MR. STUART BY MR. KIPP:

Exhibit 32-P says "current residual value". Mr. Kipp asked "current as of what date?" Mr. Stuart answered that what was meant was current with the August, 1976 issue of the Pacific South Coast Edition and the NADA Official Used Car Guide. In order to arrive at these figures, if there was a 24 month lease, Mr. Stuart would get a two year old car of the same make and model and take the average trade-in value out of that book. (Tr Vol. 1 at 182-185)

CONTINUED EXAMINATION OF MR. STUART BY MR. McRAE:

In some cases, the listed residual values on Exhibit 32-P are the same as the figures on the work sheets in the 64 packets and, in some cases, they are not. The residual on the open-end leases is almost exactly the same. The net leases differ in almost every case. The percentage of variation for each of the vehicles is fairly small. Mr. Stuart explained that the total differences approximate the amount of inflation since the leases were signed. (Tr Vol. 1 at 185-186)

Mr. Stuart further explained Exhibit 32-P to the Court as follo

> "In determining the valuation, we try to use the best evidence that's available; the accounting books and records used, estimates that were prepared by Globe Leasing through Mr. Weigelt on the date the leases were negotiated. I have updated the residual value of each of the vehicles to the best of my ability. Through Exhibit 32-P, by using the latest information that's availabe, the adjusted gross profit went from $37,595 to $44,825.54.

Mr. Stuart accounted for that increase of the adjusted gross profit through inflation that existed throughout that period. (Tr Vol. 1 at 186)

Mr. Stuart summarized the preparation of Exhibit 18 and 32 and explained Exhibit 33-P as follows:

> "Exhibit Nos. 18 and 32 have derived the amounts of gross profit in terms of cash flow; best estimate that would be available as a result of the 64 leases that Globe Leasing negotiated. In addition to cash flows through gross profit, they deal with the amounts to be received from the lessee --residual values of the vehicles on the one hand versus the purchase price on the automobile, the interest and other costs on the other hand--there are additional cash flow items that resulted, that came about as a result of Globe Leasing doing business. Those basically are overhead expense items.
>
> To match the cash flow associated with the gross profit with other cash flows, I resorted to Exhibit 5-P, which was the income statement for the nine month period.
>
> Schedule 3 is a comparison of cash receipts and disbursements on an 11 month basis from 8-9-73 through 7-8-74. Because the business operated for approximately 11 months, and the financial statements were approximately nine months, several adjustments had to be made. In addition, there were items that--of expense that I did not think reflected the true measure of cash flow for which I made adjustments.
>
> In terms of cash receipts, I took the adjusted gross profit from Schedule 1 (Exhibit 18) of $44,825.54, added fees, rental and other revenue, which was taken from the 5-31-74 earnings statement but adjusted for the 11 month period rather than a nine month period. That gave a total anticipated cash receipts for Mr. Weigelt's operation for an 11 month period to $50,716.54.

With respect to disbursements, I took the expenses on the May 31, 1974 earnings statement, Exhibit 5-P, of $41,288. To that I made several adjustments. I deducted the interest, because the interest had already been computed on Exhibit 18. However, all of the interest did not apply to installment paper. Some of it applied to demand notes. I estimated the amount of the interest that applied to demand notes. That is $645. I added a salary adjustment of $2,250, which represents salaries that were not taken by Mr. Weigelt and Mrs. Weigelt at the early stages of the business. In other words, I assumed that these were additional expenses that have to be paid if the business were to continue to operate.

I added a bad debts adjustment and calculated that amount to my experience with automobile leasing businesses I've been associated with.

The total adjusted operating expenses was, therefore, $41,288 less $3,771, which is the sum of the adjustments, arriving at a nine month figure of $37,517. On an 11 month basis that would be $45,853.

The final figure, the net cash flow, is the difference between cash receipts and cash disbursements for the 11 months of operation of approximately $4,800. In other words, as it resulted, the activities of Mr. Weigelt in Globe Leasing Corporation for 11 months generated an anticipated cash flow for that period of approximately $4,800 positive." (Tr Vol. 1 at 187-189)

Although Mr. Stuart testified that he has familiariz himself with the national statistics on bad debts with auto leasing agents in 1974-1975, an objection by Mr. Kipp for lack foundation was sustained.

Exhibit 34-P shows Mr. Stuart's determination of the rate with which Globe Leasing was growing during the period

it was in operation. Mr. Stuart explained the significance of Exhibit 34-P as follows:

> "In the first place, it's a fairly short period. So, the accepted statistical methods of linear correlation and exponential smoothing will not work very well. However, I tried to arrive at some method for determining the rate of growth of the business for the first 11 months.
>
> I determined that the best method was to compare the average number of leases negotiated in the last six months with the average number of leases negotiated the first six months.
>
> And then I made another adjustment because 15 of the leases involved Leisureamerica, which was a special situation that I did not feel would represent growth. I made a calculation of the rate of growth excluding the Leisureamerica leases.
>
> As the calculations show, the average for the first six months was 3.2 leases. The average for the last six months with Leisureamerica was 7.5. Without Leisureamerica it was 5.8.
>
> If this rate continued at approximately the same pace--and it was verified by linear correlation and exponential smoothing, although for a short period of time those methods are not valid statistical approaches--would indicate that Mr. Weigelt's rate of growth was increasing at approximately 32 leases per year. That would be excluding Leisureamerica.

Mr. Stuart considered other factors in excluding Leisureamerica. He testified that it was common knowledge in the financial community in Salt Lake City in the summer of 1974 that Leisureamerica was in financial trouble. Zion's Bank had filed a

notice of default on the note Leisureamerica had with Zion's Bank. (Tr Vol. 1 at 190-192)

VOIR DIRE OF MR. STUART BY MR. KIPP:

Mr. Stuart testified to not knowing very much about the leases other than those to Leisureamerica. Mr. Kipp then objected, stating that if Mr. Stuart's appraisal of Globe's business was going to be fair, he ought to have the same data about all of the lessees. If there were 30 more bad leases, Mr. Kipp believed he was entitled to the benefit of that. The court sustained that objection. (Tr Vol. 1 at 192)

CONTINUATION OF EXAMINATION OF MR. STUART BY MR. McRAE:

With respect to the management qualities of Globe Leasing, Mr. Stuart stated that "it is very seldom that one sees a new business that will start out as well as Globe, particularly in the leasing business". Out of all of the business evaluations made by Mr. Stuart, Globe Leasing was one of the better operations with the exception that it was under-financed and lacked capital. (Tr Vol. 1 at 192-193)

Mr. Stuart was aware that the Leisureamerica leases were terminated prematurely. (Tr Vol. 1 at 193)

Mr. Stuart then explained the significance of Exhibit 35-P as follows:

> "I prepared Exhibit 35-P to arrive at an estimate of the approximate loss that would have been sustained by a lessor in recovering and marketing a large--in this case 15 different leases--number of vehicles.

There were actually more than 15 vehicles because one of the leases involved three travel trailers.

Schedule 5 is an analysis of that determination. The column at the far left identifies the lease number. The first column is the vehicle cost. The second column is the security deposit that was received by Mr. Weigelt. The third column represents lease payments for May, June, July and August. Therefore, Column 4, which is Column 1 less the amounts of cash that Mr. Weigelt received on those leases, is the amount of unrecovered cash. Column 5 is the wholesale price as determined from Kelly's Blue Book. In this case we couldn't use the NADA books because the information was not available. Kelly Blue Book is generally higher than the NADA because of the way it comes out on a two month period rather than monthly, and it's associated with the southern California market. But, regardless of that fact, we had to use it.

And Column 6 is 5 minus 4, the expected cash gain or loss that a lessor would take in selling this amount of vehicles. (Tr Vol. 1 at 193-194)

According to Mr. Stuart, the figures in Column 5 were very conservative because rather than sell automobiles which are repossessed, most leasing companies release the car. (Tr Vol. 1 at 193-195)

Mr. Stuart explained the significance of Exhibit 36-P as follows:

"Exhibit 36-P is the Schedule which shows a Federal Funds Rate by months from 1973 through 1975. The Federal Funds Rate is significant because it's a barometer of how available funds are to the banking community. Banks are required to maintain reserves; it's a requirement of the Federal Reserve System. And if their-- these reserves are not maintained, they're

subject to sanctions by the Federal Reserve System.

In order to maintain the proper amount of reserves, banks sell reserves among themselves. And the transfer of these reserves generally is referred to as Federal Funds.

The rate at which Federal Funds--the rate on Federal Funds; in other words, the rate that one bank charges another for the transfer of reserves--is a reflection of how tight money is, because, as you can see by the Schedule, in the summer of '74 the Federal Funds Rate went to 12.92, which means that banks were paying themselves interest higher than in many cases they were charging their customers.

The prime rate never did get as high as 12.92 percent, which is a reflection of how very, very tight money was in the summer of 1974.

However, the Schedule also shows that this situation did not last for an extended period of time. By March of 1975 the Federal Funds Rate was down to five percent."

Banks had excess reserves or money to lend in 1975, which they didn't have in the summer of 1974. (Tr Vol. 1 at 195-196)

Mr. McRae reviewed the background of Globe for Mr. St and then asked Mr. Stuart if he had an opinion as to whether or it would be good banking practice to terminate the banking rela ship with Globe. Mr. Kipp objected and the objection was susta (Tr Vol. 1 at 196-199)

Mr. Stuart was asked to relate "his experience in th financial circles of the banking world". He explained that he was retained by Utah Bank and Trust on a number of occasions t examine companies to which they were interested in making loa

One of them was the former Valley Music Hall. He was also retained by Tracy Collins to make evaluations for proposed loans to a development company in Bountiful. He has made such evaluations on numerous other occasions. This type of analysis is part of the general expertise of an economist. (Tr Vol. 1 at 199-201)

Mr. Stuart taught Money and Banking in major universities for almost 20 years. Over that same period he also taught Collection and Credit from time to time. He has also instructed bankers and bank officers in good banking processes. Mr. McRae asked Mr. Stuart again if, based on his experience and expertise, he had an opinion as to good banking practices insofar as it pertains to the plaintiff and the defendant in this case. Mr. Kipp objected to the question on the grounds that there was no foundation. (Tr Vol. 1 at 201-203)

VOIR DIRE OF MR. STUART BY MR. KIPP:

Mr. Stuart agreed that ordinarily banks rely on the documents that are contained in their transactions with customers and that good banking practice would dictate that. He further admitted that banks have to reckon with each customer and each transaction and make some judgment about that transaction. Banks hire people with good judgment with which to exercise discretion in connection with each transaction that comes to them. Some people are given higher limits of authority than others because they have greater judgment and discretion. In exercising that

judgment or discretion, the officer would consider a broad variety of factors in order to assess what to do in the particular situation. Among the factors to consider would be the capitalization of the debtor or borrower; others would be the business history, quality of the business that was developing and the care with which the business was conducted. Lack of documentation in files would be a factor, which would give some concern to a bank. Lack of title where a car was pledged as security would be far from being considered good banking practices. Mr. McRae objected to this line of questioning as being cross-examination rather than voir dire. Objection was sustained. The Court then called for a recess. (Tr Vol. 1 at 203-206)

In his professional duties, Mr. Stuart has been called upon to instruct and teach bankers in good credit practices. He has acquainted himself with good credit practices in the banking business. Mr. Kipp objected to this line of questioning. Objection was overruled. Mr. Stuart has had occasion to acquire knowledge and expertise in the field of credit termination, business interruption by virtue of the extension of credit, and the interference with business relations by virtue of termination of credit. (Tr Vol. 1 at 206-207)

Mr. Stuart has familiarized himself with Exhibit 8-P. Mr. Stuart was asked if he had an opinion as to whether or not, without prior notice to a bank customer, and based on all of

the exhibits, the dispatch of Exhibit 9-P to a "customer or a customer of a bank customer" would be good banking or business practice. Mr. Stuart stated that he had an opinion. Mr. Kipp objected because of no foundation and a lack of relevancy. The objection was sustained. Mr. Stuart was then asked if he had an opinion as to whether or not forwarding to Globe Leasing without notice Exhibit 30-D was good banking and business practice. He answered yes and Mr. Kipp made the same objection. Objection was sustained. (Tr Vol. 1 at 207-208)

Mr. Stuart was asked if he had formulated an opinion as to whether or not Globe Leasing could have remained in business under the financial situation that existed in 1974, the action of the Bank in claiming ownership of the leases and entitlement to the security deposits, and the mailing of the letters in 9-P. Mr. Stuart testified that he knew of no conceivable way that Globe could have stayed in business given those circumstances. He explained that it's important for a company to have a cash flow before any banks will lend money. Mr. McRae asked Mr. Stuart what the term "corresponding bank" means. Mr. Kipp objected. Objection was sustained. (Tr Vol. 1 at 208-210)

Exhibit 39-P is the computation made by Mr. Stuart of the most probable course that Globe Leasing would have taken had it not been for the termination that was created by the circumstances in July of 1974. Exhibits 18 and 32 through 36 are pertinent to Exhibit 39-P with the exception of one or two items. The first exception is the discount rate that Mr. Stuart

used in discounting the projected cash flow to present value. The rate employed was 6.29 percent. The second exception is the amount of variable cost associated with the cash flow on each new lease acquired. Mr. Stuart explained how he handled these two items:

> "The first is the average interest rate that existed on Government securities; all maturities over the last complete business cycle. And the second item, the amount of cash flow, net cash flow associated with each lease, was derived from an examination of Mr. Weigelt's previous record excluding the Leisureamerica leases."

In terms of the financial calculations associated with each, they were somewhat higher than the others and also there was evidence that they went bad and Mr. Stuart didn't think it would be a fair calculation to make projections using those as part of the projection base. Mr. Kipp made an objection that was overruled. The judge, however, allowed a continuing objection. (Tr Vol. I at 210-213)

Mr. Stuart then proceeded to explain Exhibit P-39 over Mr. Kipp's continuing objection. He explained that the first column in Exhibit P-39 is the year. Mr. Stuart projected six months for the year 1974 and ten years into the future. Mr. Stuart explained why he used the ten year figure as follows:

> "There are a number of reasons why ten years was used. Ten years conforms to standard practice in valuation of using the ten-times multiplier of earnings. Ten years is also, when applied as a multiplier, the approximate amount of the discounted present value of stream of future receipts

using exponential smoothing of cash flows. And, third, because the period of ten years has been sustained by courts as a reasonable period."

He stated that the use of the ten year period is in accord with accepted economic and accounting principles. Mr. Stuart explained further:

"The second column that's designated as Column 1 represents base year cash flow. That was determined from Exhibit 33P. The amount is different in the first year than in the last year because of the termination in the middle of the year.

"The second column is the projections or adjustments. The first item of negative $15,000 is the amount that I've estimated would be lost as a result of the Leisureamerica lease had they been liquidated by a leasing company.

"It's taken from Exhibit 35P. That shows $14,434. I rounded it off to $15,000. Exhibit 34P shows the rate of growth that Globe Leasing had experienced in the period that was characterized by very tight money and slow automobile sales. And yet Globe Leasing still increased the number of leases--leaving out Leisureamerica, using this simple calculation--at the approximate rate of 32 leases per year.

"However, I don't think that Globe Leasing could sustain that rate of increase. Based upon my judgment, from an analysis of the business, I assumed that the number of new leases that Globe Leasing could absorb each year would be approximately ten. The amount that I attributed to the net cash flow associated with each new lease, after deducting my estimate of variable costs, was $600 per lease. That would represent the amount projected for 1975 and '76, and thereon."

Mr. Stuart was asked what he projected to be the total figure resulting from his calculations. He stated that there would

be approximately 64 leases in July of 1974, and by the time the ten years were out there would be an additional 100 leases that would be serviced by Globe. He testified that based upon the growth of other leasing companies, this is a very conservative rate of growth. Mr. Stuart went on with his explanation of Exhibit 39P as follows:

> "Well, Column 3 is a summation of Columns 1 and 2 projecting the next annual cash flow year. And the final column is the present value or Column 3 reduced by a discount rate of 6.29 percent. The total of those values in Column 4 is the present value of the discount cash flow over a ten year period that I've projected as the amount of business that Globe Leasing could do based upon the averages of the existing business in 1973 through July of 1974."

The total figure, $225,704, represents Mr. Stuart's estimate of the damages because of the termination of the business of Globe Leasing after payment of all costs, expenses and salaries. (Tr Vol. 1 at 213-216)

Exhibits 18P, 32 through 36 and 39 were received into evidence over the objection of Mr. Kipp. (Tr Vol. I at 216)

CROSS-EXAMINATION OF FRANK STUART BY MR. KIPP:

Mr. Stuart testified that his estimate of Globe's rate of growth was conservative. He stated that an eleven month track record like Globe's would cause him to overcome

initial skepticism in backing a "guy with a paddy full of credentials together with three grand." (Tr Vol. 1 at 216-217)

He repeated that after the Bank's termination, there was no conceivable way for Globe to go on. That evaluation did not include, as a base, information about six leases brokered by Globe between July 15th and October 15th. Mr. Stuart admitted that, though on a limited scale, Globe did provide six lessees with lease vehicles while the Federal Fund rate dropped. "To that extent" Globe was "somehow engaged in the leasing of vehicles as late as October." (Tr Vol. 1 at 217-218)

Mr. Stuart testified that he knew that Mr. Weigelt with some experience; actual capital of only $3,000; personal assets for himself and his soon-to-be wife not exceeding $15,000.00; and no track record attempted, without success except with Bank of Salt Lake, to obtain financing. Mr. Stuart agreed that he too would have been hesitant. (Tr Vol. 1 at 218-220)

After a comment about a track record which included 64 leases in eleven months, "most of which appeared on the surface to be good," Mr. Stuart explained that he did not make a payment summary for each lease, but assumed that they were current because all payments to the Bank from Globe on the

computer printouts upon which he had relied were timely. He explained such reliance on the total Globe-to-Bank payment record because he couldn't "imagine anybody paying in advance on these; it doesn't make sense," and would be "highly unusual." He also stated that the fact of such prepayment would "not necessarily" cast doubt on his conclusion as to the soundness of the individual lease. (Tr Vol. I at 220-224)

Mr. Stuart agreed that the bankability of Globe would be measured on their track record and quality of business produced. He also agreed that new businesses generally tend to take more marginal business in an effort to develop their business. He testified that he did not think this was true in the case of Globe Leasing. Mr. Stuart agreed that the leasing business is a very competitive business and as a result, some leasing companies go broke. (Tr Vol. I at 225-226)

The profitability of a net lease is determined to a great extent on how good the estimate is of what the value of the car will be at the end of a lease. With reference to Exhibits 32P and 18P, respectively Mr. Stuart's and Mr. Weigelt's estimates of what the value of the cars would be at lease end, Mr. Stuart acknowledged that his guesses are down to pennies. Mr. Stuart explained that the values to pennies are produced by a combination of the average trade-in plus

the accessories and mileage computations. He admitted that no penny values are given for accessories and mileage computations and that the penny figures were not from "the book". (Tr Vol. I at 226-228)

Mr. Stuart defined "fair market value" as the price someone is willing to pay for a car. The NADA gives a broad general guideline to assist a car dealer in determining what he can pay and the price at which he has to sell a car. The spread from the lowest to the highest value in the NADA Book is a rather substantial percent. Exhibit 40D was marked and contains the July 1976 edition of the Pacific South Coast Edition of the NADA Official Used Car Guide. Mr. Stuart testified that this book is representative of the above discussion with respect to values. The indications that the book gives about values are conditioned on the car being in marketable condition. Any costs of repair necessary to place the car in marketable condition are deducted from those values. A security deposit was charged to the lessee to cover these expenses. Mr. Stuart agreed that it's not uncommon for such deposits to be paid to assure that the merchandise is returned in good condition. Mr. Stuart believed it to be a good business practice to hold those deposits in reserve so that they would be available to pay if the merchandise was returned in good condition. Mr. Stuart testified that this practice is not

followed in the automobile leasing industry. He further testified that it is common in the business to use the deposits for working capital. (Tr Vol. I at 228-232)

The residual figures Mr. Stuart used in his calculations are standard in the industry, the average trade-in values. That presumes that the vehicle is in marketable condition. Mr. Stuart hasn't made an allowance in his calculations for the cost of reconditioning. (Tr Vol. I at 232-233)

Mr. Stuart was shown the work sheet contained in Exhibit 25D, the Richter-Robb lease folder. The Exhibit file folder showed a residual value calculation showing Estimated Value at Lease Termination, $1,925; Safety Factor, $325.52; and Residual Value, $1,599.48. Mr. Stuart testified that this is a typical calculation contained in all of the lease files. Mr. Stuart would expect a bank to rely on those calculations in taking an assignment of that lease and arranging funds. Mr. Weigelt's calculation with respect to the Richter-Robb lease contained on his in-house white work sheet indicated "Valued 24 Months per Blue Book, $1.925;" "Safety Factor, $662.08," [$325]; and "Customer Balance at End of Term, $1,262.92," [equivalent of residual value]. Mr. Weigelt's in-house calculations were, as evidenced by his worksheet, $300 less advantageous. Mr. Stuart agreed that Mr. Weigelt set up a safety factor for his own purposes of $600 and set up

one for the Bank of $300. (Tr Vol. I at 233-234)

Mr. Stuart is aware of the two Hildreth leases. The terms of the leases are substnatially different. Mr. Kipp stated that the evidence in this case suggests that one of the leases was prepaid in full. Mr. Stuart considered this highly unusual. If he were a bank and a person brought a lease to him that showed a 24 month term and involved an advance based on that lease of some $8,000, he wouldn't like it very well if he found out there was another lease in existence that was prepaid. He would want to investigate. (Tr Vol. I at 234-236)

If Mr. Stuart discovered that one of the customers he was dealing with had pledged security for his bank to someone else, he wouldn't like that. It is against the rules of banking business and probably against the law. The situation where the same vehicle was pledged by Globe to secure loans at Valley and Bank of Salt Lake would concern Mr. Stuart only if there were a pattern of such transactions. Mr. Stuart testified that a bank would probably continue to do business with a customer who had double financed a vehicle and assigned a lease that didn't exist. (Tr Vol. I at 234-240)

Mr. Stuart stated that in the long run "cash flow" and "net profit" are the same thing. Cash flow is mentioned throughout Exhibit 39P. Depreciation was not included in

Exhibit 39P. Mr. Stuart followed the financing method recommended by the AICPA and they don't consider depreciation in that financing method. Mr. Stuart is acquainted with the individual who did that accounting and considered him competent. (Tr Vol. I at 240-242)

Mr. Stuart has seen Mr. Weigelt's 1974 tax return. He was not aware that Mr. Weigelt testified that he didn't file a tax return in 1974 because he didn't make any money. Mr. Stuart claims a tax return should have been filed if they had made any money or not. The 1973 tax return shows an operating loss. (Tr Vol. I at 242-244)

Mr. Stuart is aware that when the Bank terminated its financing of Globe Leases, there were almost $400,000 worth of leases outstanding. Mr. Stuart testified that it was phenomenal for a $3,000 company with principals having net worths of under $10,000 and $5,000 dollars to have that sum of leases. Mr. Stuart wasn't surprised that most of the leases resulted in losses at their expiration or upon their default. Mr. Stuart attributed these losses to the way in which the leas were handled by the Bank in December of 1974. Mr. Stuart testified that if he were a customer and received a letter fro the Bank and a letter from Globe telling him he owed each of them, he would be "concerned about who to pay". In that situa

tion, he "might default" or "might" want to get out of the whole deal. He would withhold payment until it was settled but ultimately fulfill his obligation. Mr. Stuart was unable to document his statement that the Bank disrupted the lessees of Globe. (Tr Vol. I at 244-247)

After examination of Exhibit 14, Mr. Stuart testified that there was nothing in the lease to prevent a sale, assignment or pledge. He acknowledged that it is not uncommon in the financial world for holders of evidence of debt or obligations of this kind to assign them or to sell them in order to turn them into money. Mr. Kipp read the following portions of the lease to Mr. Stuart:

> "The undersigned, Globe Leasing," the office and so forth,
>
> does hereby for good and valuable consideration to it paid by Bank of Salt Lake, sell, assign, transfer and set over unto the Bank of Salt Lake, all and every of the rentals now due and owing, or that may at any time hereafter become due and owing to the undersigned..."

and so forth. It says

> "For Like Consideration and said Bank of Salt Lake is authorized and empowered to collect all sums of money presently due or that at any time hereafter may become due and owing as rental under the provisions of said lease."

Mr. Stuart was familiar with that portion of the lease. Mr. Stuart considered the lease to be an ambiguous document but

admitted that it is a standard lease form which was brought to the transactions by Globe. (Tr Vol. I at 247-251)

Mr. Stuart's calculations with respect to cash flow require a number of presumptions in order to reduce his predictions to exact figures. One of them is the interest rate that the money would earn and another is present value of the money. In his calculations, Mr. Stuart allocated a $400 bad debt reserve. He is aware that the total lease obligation was around $400,000 and to whatever extent the leases did not conform to his experience, and what the credit was worth and what the bad debt losses were worth, Mr. Stuart's figures would be reduced. (Tr Vol. I at 251-252)

Mr. Stuart knew very little about the condition of the reclaimed cars. To determine their fair market value, he would have to know their condition. (Tr Vol. I at 252)

Mr. Stuart excluded the Leisureamerica leases in his calculations because he believed they went bad. If a large number of other leases went bad all at one time, Mr. Stuart testified that he would have to make additional adjustments in his calculations. (Tr Vol. I at 252-254)

Mr. Stuart testified that it would be alright for a leasing company to spend the security deposits as long as they were able to return the deposit if necessary at lease

end. (Tr Vol. I at 254)

Mr. Stuart testified that although it is unlikely that banks would finance 110% of the purchase price of a car, he also stated that it is not uncommon for a bank to loan 100% to a car rental agency, lessor, or lot. It would be more unlikely with a small capital company. (Tr Vol. I at 254-255)

In the last half of 1974, Mr. Stuart stated that most of Globe's cash flow would come from the security deposits. Without the security deposits, Globe would need help from financial institutions and if they were unable to get that help, they would go broke. (Tr Vol. I at 255-256)

Mr. Stuart was not aware that Globe had endeavored to obtain financing from Valley Bank. He was not aware that they had some separate short term financing at the same time as their financing with Bank of Salt Lake. He wasn't aware that they had defaulted them. He also was not aware of the six brokered leases. (Tr Vol. I at 256-257)

Mr. Stuart has acted as expert witness for an equal number of banks as compared to companies. (Tr Vol. I at 256-257)

The amount of money an individual or company is authorized to borrow varies and fluctuates rather widely from time to time. It depends on a variety of factors including the prime rate, Federal Fund Market, etc. Depending on the

total financial position of a borrower, Mr. Stuart, as a banker would be concerned if that borrower was spending security deposits and spending loan funds in excess of the cost of the car. He added, however, that he wouldn't really be bothered with respect to the security deposits for a leasing company since that is their normal practice. (Tr Vol. I at 257-259)

Some of Globe's estimated residual values were at wide varience with the Blue Book values. (Tr Vol.Iat 259)

If an operator of a lease company told Mr. Stuart that he had double financed a car because he had forgotten he had financed it once, he would think that this was a little slipshod with respect to their overall business management. He didn't think that pledging a lease to a bank on a vehicle that was not the subject of that lease at all was satisfactory business practice. (Tr Vol. I at 260-261)

REDIRECT EXAMINATION OF MR. STUART BY MR. MCRAE:

Mr. Stuart didn't make allowances for reconditioning because lessors are usually able to move their cars at a higher amount than the average trade-in values of the NADA or Blue Book. (Tr Vol. I at 261-262)

Mr. Stuart has testified that he was not surprised that the Bank lost money on the leases at either the expiration or default of the lease. Mr. Stuart explained that small

banks like the Bank of Salt Lake are anxious to get rid of automobiles and get the notes off. It has been his experience that financial institutions that move defaulted vehicles obtain far less than could be obtained by someone who is in the business every day. (Tr Vol. I at 262)

Mr. Stuart explained the deficit shown in Randy's (the accountant's) March 31 statement Exhibit 5 as follows:

> "The reason why--there are two reasons why I show a positive cash flow and the financial statement here shows a deficit. No. 1 is that this is a statement ending May 31, and mine included the 11 months that ended in the first part of July. The second reason is that financial statements prepared in accordance with generally accepted accounting principles present fairly the results of operations, are conservative, for the same reason that valuing the stock of a trade concerns the reason the book value of a company--which is the value that you'd obtain per share of stock if you divided net worth by number of shares--is less than the fair market value on the market. It's because of the conservative practices that are used by accountants, like original cost and the basis of the amortization compared to valuation techniques where you have to approximate what the fair market value would be.
>
> In addition I'll point out again this balance sheet contains $77,241 of deferred lease income that was earned in the first year, but in accordance with generally accepted accounting principles could not be recognized in that year but is spread over the leases."

Mr. McRae asked Mr. Stuart what portion of the deferred income of $77,000 was deferred earnings. Mr. Stuart answered as follows:

"That would depend upon the number of new leases made in the next two years. However, the business, just the company's--the $77,000 would be matched against approximately a hundred thousand of overhead expenses. In other words, Mr. Weigelt could have paid himself and his wife and rented the building had he not leased one other automobile for another two years and would almost have broken even."

The books reflect that the salary for Mr. Weigelt in July of 1974 was $1,000 a month and his wife's salary was $500 a month. (Tr Vol. I at 263-264)

Mr. Kipp stipulated that the witness would testify that all of the documents he prepared are based on what he deems to be sound economic or accounting principles within the areas of his expertise. (Tr Vol. I at 264-265)

RECROSS-EXAMINATION OF MR. STUART BY MR. KIPP:

In his analyses to determine the valuation, Mr. Stuart found that there would not have been any additional cash flow to Globe from July of 1974 to the end of 1974. Their cash flow would come entirely from security deposits and payments on the lease. (Tr Vol. I at 265-266)

The bad debt reserve Mr. Stuart has testified to previously would be one-tenth of one percent of the gross, or $400 against $400,000. This matter failed to take into consideration the reconditioning. Mr. Stuart also had in mind the obligation of the lessee to return the car under

certain conditions. (Tr Vol. I at 266-267)

Mr. Kipp then made the following motion to the court:

> "Like to renew my motion, now, with respect to this matter, and in the form of a motion to strike on the grounds (1) no proper foundation, (2) speculative on the law we've argued, and on the evidence, (3) that the opinion testimony is based on facts not in the records and therefore not admissible, (4) that in any event it's made further speculative by this witness's testimony that in the absence of additional financing there's no evidence any was available, and with the negative cash flow he predicted of twelve thousand some dollars the company would have gone broke anyway. That's my motion.
>
> THE COURT: The Court will take it under advisement.

(Tr Vol. I at 267)

AUGUST 6, 1976

DIRECT EXAMINATION OF GLORIA WEIGELT BY MR. KIPP:

Gloria Weigelt. Prior to the time she was married, her name was Gloria Morrison. Present address is 337 Spencer Way, Farmington, Utah. Mrs. Weigelt is the wife of Mr. Weigelt, principal officer and manager of Globe Leasing. Mrs. Weigelt was associated with her husband in the Globe Leasing venture. She was a shareholder in that company. The company's affairs were principally under the direction of Mr. Weigelt with some assitance from Mrs. Weigelt. (Tr Vol. I at 268-269)

Mrs. Weigelt had no first hand knowledge about the Hildreth lease. However, she probably took that lease to the bank to assign it and obtain the credit to Globe's account. She didn't know who signed the name at the bottom of the lease. She is certain she didn't sign it. She did not make the marking indicating that the now missing lease was paid in full. She is aware that the Bank credited Globe's account for about $8,000 for that lease. Mrs. Weigelt identified Mr. Weigelt's signature on the top of Exhibit 29D. (Tr Vol. I at 269-270)

ABSTRACT OF TRANSCRIPT

VOLUME II

August 3, 1976

OPENING STATEMENT BY MR. McRAE:

Mr. McRae made an opening statement as follows:

"The file reflects a decision of the Utah Supreme Court, and I would like to point out to the Court certain aspects of that decision.

"In the first paragraph, Justice Ellett finds (1) that Globe Leasing, the corporate plaintiff, was the owner of the subject matter vehicle, and (2) that the defendant bank had two security interests to guarantee it against loss.

"I point out to the Court the findings of Justice Ellett by the--and it sets forth certain findings by the court. And I submit that those findings, in view of the said appeal--because of the error at another stage of the proceeding--I submit those findings are binding on this Court.

"Now, in general substance and theory, the corporate plaintiff, corporate plaintiff and the individual plaintiffs as their interests may appear, bring this action in business slander and for interference with contractual rights.

"And I submit to the Court that the following elements are the elements which the Court should keep in mind. That (1) a publication issued implicating the plaintiff, (2) the publication was defamatory in either respect--and a publication need not be defamatory on its face, or the publication must be defamatory in light of all the circumstances in the evidence. Defamation must injure the reputation or demeanor or good will or confidence of the customers of plaintiff, and it must be adverse, derogatory or unpleasant to create unpleasant feelings. And the defamation of the corporation can be shown by implying that credit, and defamation with malice exists where there is wanton disregard of plaintiffs' rights and there is a lack of good faith.

"This type of malice eliminates the defense of qualified privileged communication.

"The other elements of the case, we're prepared on the law, but in essence I would point out to the Court that business slander differs from personal slander or libel." (Tr Vol. II at 2)

OPENING STATEMENTS BY MR. CARMAN E. KIPP

Mr. Kipp provided an overview of the basic facts inv in the transactions leading to this suit:

Mr. Weigelt, together with Gloria Morrison, who late became his wife, and a man in insurance, Mr. Chaney, set about form a leasing company in 1973. Mr. Weigelt had previously be terminated by another leasing company under questionable circu stances and had minimal capital. (Tr Vol. II at 4,5)

Depending on the testimony referred to, the capital involved for the corporation was either something less than $10,000 worth of shares at 25 cents per share, or a total of $3,000 in capital. According to Mr. Weigelt's testimony, his worth at that time was under $10,000 and Miss Morrison's under $5,000. Thus, they contacted a number of banks in the Salt La County area to obtain financing for their proposed leasing bus nesses. Most of the banks turned them down; two said they mig consider their business except that money was not currently av able. (Tr Vol. II at 5)

Mr. Kipp pointed out that the complaint repeats the claims several times. (Tr Vol. II at 5)

They made a presentation to the Bank of Salt Lake, borrowed forms, which they did not develop, and which Mr. Kipp

said were incomplete, ambiguous, and confusing. (Tr Vol. II at 5)

They talked with Jim Perry at the Bank of Salt Lake, a junior officer, who presented the matter to the loan committee, who said "We're not interested." After a short passage of time, Mr. Perry talked to Mr. Parker, then the president, but who has not been with the Bank for a year. It was decided to take a sampling of leases and see how they did. (Tr Vol. II at 6)

Mr. Perry wrote a letter saying the bank would buy some leases from Globe Leasing. The letter did not mention the amount of dollars or number of leases, nor did it mention that the arrangement for purchase of such leases would be conditional upon the Bank's approving credit and could be terminated by written notice of either party at any time with no provision as to the time of the notice. (Tr Vol. II at 6)

The Bank commenced the purchase of some leases in the form of an assignment which will be in evidence before the court. There were two kinds of leases: one an open-end lease which left some liability to lessee at the end if the car had some lesser value than had been predicted; or a net lease where the Bank of whoever owned the lease would take the loss if the car was worth less. Mr. Weigelt made all of the calculations for Globe Leasing. (Tr Vol. II at 6)

"The claim as to the business is that of the corporation and not that of the individuals. They're claiming separate." (Tr Vol. II at 6)

The Bank purchased about two-thirds of the leases presented to them. The procedure was that Weigelt would call and describe the proposed lessee and the credit information; Mr. Perry would check and indicate whether or not the credit wa satisfactory. If so, the Bank would purchase the lease and the assignment documents would be executed. (Tr Vol. II at 6,7)

The title would be ordered by Weigelt, issued to Glob Leasing's name with lien to the Bank of Salt Lake, and delivere to the Bank. (Tr Vol. II at 7)

The Bank initially discussed taking 20 to 40 thousan dollars worth of leases; over a period of about a year, the figure was extended to about $390,000. (Tr Vol. II at 7)

The arrangement remained the same and continued under the general direction of Mr. Perry, who concedes he exceeded h loan authority. If the loan were construed as having been mad to Globe Leasing rather than to the individual lessee, the Ban was far in excess of its statutory lending limit based on the percent of the total capital of the Bank that can be loaned to one borrower. (Tr Vol. II at 7)

Mr. Kipp stated that the evidence shows that the doc mentation is subject to more than one interpretation. His evi is that the Bank believed and intended to buy leases from Glo to collect the payments via Globe from the lessees, and to

receive interest on said payments. (Tr Vol. II at 7)

"There is some evidence that the titles were nominally in Globe, although we'll claim the Bank had the right to title and Your Honor will have to determine whether it was a loan or purchase transaction." (Tr Vol. II at 8)

"We believe the evidence leads to the conclusion that the Bank was purchasing the leases," as indicated by the documents and the transfers of funds. (Tr Vol. II at 8)

After about a year, and while Mr. Perry was on vacation, Mr. Parker, the principal officer of the Bank, became aware of the Globe transactions by discovering leases to a facade corporation called Leisure-America, which had no substantial assets and functioned as a fast-close recreational real estate peddler. (Tr Vol. II at 8)

The Bank files were reviewed, disclosing that titles had not all been delivered as promised, nor had insurance on the vehicles been furnished as represented. Further investigation revealed that a check by Globe to Naylor Ford--for a vehicle which was supposed to have been paid for, titled, with the title delivered to the Bank--had been drawn against insufficient funds by Globe. Globe's financial structure was revealed as very shaky--not a bankable entity. One car had been financed at the Bank of Salt Lake and double financed at Valley State Bank, making it necessary for the Bank of Salt Lake to pay Valley

Bank its loan in order to preserve its security. Mr. Kipp states that this is one of the elements of his counterclaim. (Tr Vol. II at 8)

A forged lease was filed by Globe for a Mr. Hildreth from California and "it developed that the original lease had been prepaid and lease payments were ongoing when assigned--when represented by the lease and Globe's representative that the loans, instead of being for bankable amounts to the vehicle were for 110 percent of the purchase price of the vehicles, or more than their new value." (Tr Vol. II at 9)

Contrary to the agreement that the Bank would review credit and refuse where it did not check out, Globe managed to get approval on one Leisureamerica lease, and by "working it through a secretary or administrative assistant person, had caused the bank to get on some 16 bum leases with a no-good company." (Tr Vol. II at 9)

Parker terminated business with Globe. Weigelt complained vigorously in a conversation which included his attorney Miss Morrison and Mr. Parker. (Tr Vol. II at 9)

Mr. Weigelt pointed out that Mr. Perry's letter defining the arrangement provided for written notice, and he noted that three leases were pending. Mr. Parker caused the Bank to honor the three pending leases and sent written notice terminating the arrangement. (Tr Vol. II at 9)

The evidence will show with respect to damages that because of miscalculation of payments and of values on the vehicles at the end of the lease, and because the lessee's credit was not good--many promptly in default--that substantial losses have resulted to the Bank. (Tr Vol. II at 9)

"Then on the matter of loss of profit we'll have some argument at the end that it's speculative and not a proper element of damages." (Tr Vol. II at 10)

The leases were not and could not have been profitable. During its year "plus" of operation, the company had an eighteen hundred dollar loss. The company had no financing before or after the Bank of Salt Lake, which left them worse than when they started. (Tr Vol. II at 10)

The Naylor Ford check returned for insufficient funds has been made good and should be stricken from the counterclaim. (Tr Vol. II at 10)

There is the matter of the forged Hildreth lease, on which the Bank lost $3,111.94, plus attorney's fees to which it is entitled. (Tr Vol. II at 10)

"There is the matter of security deposits paid at the commencement of the lease spent by Globe that run with the lease and under the assignment are the property of the Bank to offset the losses which have been incurred under the losses." (sic) (Tr Vol. II at 10)

There is the matter of any other payments which have been made under the leases. Mr. Kipp asserted that the evidence will show that some of the first lease payments were retained by Globe; and will show a differential between what Globe was paying the Bank and what the lessees were paying Globe; which funds are the property of the Bank. (Tr Vol. II at 11)

DIRECT EXAMINATION OF JAMES W. PERRY BY MR. McRAE:

Mr. Kipp pointed out that at all times during this proceeding, Mr. Perry was not an employee of the Bank and that he does not represent Mr. Perry. (Tr Vol. II at 11)

Mr. James W. Perry, living at 3405 South 200 East, appearing under subpoena, whose deposition was taken on October 1974. Mr. Perry could not remember if he had the original of the deposition presented to him for reading and correction, nor did he know the present whereabouts of the deposition. Mr. Perry is presently employed by Aquatech Pools. In July of 1973 he was employed by the Bank of Salt Lake as Assistant Vice President, in Consumer Loans, including installment loans. (Tr Vol. at 12)

Mr. Perry's duties were the loan function, application approval, credit and collection. He came into contact with Al Weigelt probably close to the month of July 1973. To Mr. Perry's knowledge, Al Weigelt had made previous contact with other members of the Bank: Keith Mendenhall, a Vice President and

Credit Supervisor, and Al Kelson, Chairman of the Board. When asked if he had conversation with them regarding Weigelt's previous contact with the Bank of Salt Lake, he said "briefly with Mr. Mendenhall." (Tr Vol. II at 14)

He did not know when this conversation occurred. No other persons were present at this conversation with Mendenhall, which Mr. Perry could not recall except that the Bank had been approached by Mr. Weigelt with regard to the funding of a leasing operation. That type of operation would have come within Mr. Perry's department as Installment Loan Vice President. (Tr Vol. II at 14)

When asked if Mr. Weigelt presented him with any documents for presentation to the Loan Committee, Mr. Perry said that he was given a notebook with documents in it. The witness was shown Exhibit 1-P. (Tr Vol. II at 14)

With respect to Exhibit 1-P, the witness was asked if, except for the portion containing copies of executed leases, the book appeared to be similar in form and content as the one given him by Mr. Weigelt. The witness replied "not quite," the difference being that the forms he had at the time were not as well prepared as the forms in the exhibit. Mr. Perry did not know the whereabouts of the book left at the Bank of Salt Lake. He said a "vaguely similar" book was left with him. As far as he knew, the book was still with the Bank when he terminated in the summer of '74. He affirmed that when he said the forms

differed, he was referring to the various documents making up the lease package that have "Globe Leasing" printed in them and the "Bank of Salt Lake" printed in them. In the book he had originally, those places were just blank, without "Globe" and "Bank of Salt Lake" inserted. (Tr Vol. II at 14, 15)

Mr. Perry affirmed that he presented Mr. Weigelt's package application for credit to the Loan Committee, which Committee was comprised of Al Kelson, Bill Kelson, Gerald Cannc Norton Parker, Keith Mendenhall, who were all officers of the Bank, except that Bill Kelson and Gerald Cannon were on the Board of Directors. Mr. Parker was then President of the Bank. The Loan Committee told Mr. Perry they weren't interested in funding a leasing operation at that time. (Tr Vol. II at 15, 1

Mr. Perry affirmed that very shortly thereafter he had a conversation with Mr. Parker, in possibly a day or two. No one else was party to the conversation. He could not recall the exact conversation, but the substance was that it was decided to try a few leases and see how they would work. Mr. Perry did not remember Mr. Parker's having given him a dollar amount. (Tr Vol. II at 16, 17)

The witness was shown Exhibit 8-P, which he recognize and said was a letter of confirmation to Mr. Weigelt bearing, a far as he could tell, his own signature. He did not recall th writing of the letter, but assumed "with no real doubt" that h

did and that the exhibit was a copy. He affirmed that the letter was written pursuant to his conversation with Mr. Parker after the Loan Committee meeting. Exhibit 8-P was offered in the proceeding and admitted. (Tr Vol. II at 17)

When asked if he knew of any other person during the ensuing 12 months having had direct contact with the personnel of Globe Leasing relative to their operation and arrangement with the Bank, Mr. Perry said "some of the other members in the department...The secretaries around there at the time. I can't recall who they were." (Tr Vol. II at 18)

Mr. Perry had authority to approve applications for credit. When asked to describe the procedure he engaged in with Globe Leasing to finance a leased car, Mr. Perry replied: "The applicant, his credit history was all phoned into the Bank. The ...credit was checked, the application was cleared. We did all of the routine investigation work that we thought was necessary to enable us to make an intelligent decision as to whether the applicant was credit worthy or not." The information he used included personal histories, name, address, where the applicant worked, credit references. He affirmed that from this the Bank made its own independent investigation of the applicant, who was then either approved or declined. If approved, the application went through the process necessary to put it on the books. (Tr Vol. II at 18, 19)

Exhibit 7-P was admitted to assist the witness in describing the processing of the leases. A separate credit advice was issued on each of the individual transactions. The money was then credited to Globe's account. The lease was then entered as an installment loan on the computer, and the Bank began service on it. The installment loan was listed under the "dealer name" Globe Leasing, but was listed under the individual name of the lessee. Globe Leasing was considered a "dealer" in the installment loan department of the Bank and was set up on the computer as such. The Bank gave Globe Leasing a copy of the monthly computer runs on its debits and credits. Exhibit 2-P contains a bound volume of a series of the Globe Leasing computer runs which were given to Globe by the Bank monthly. Exhibit 2-P was received into evidence. The computer runs show the account number, name, original amount, balance, payments, date last paid, etc. Mr. Perry testified that the computer runs indicate that there was no default in any payment to Globe through July 31, 1974 and that if there had been a failure to make a payment, it would be reflected in the computer runs. (Tr Vol. II 19, 23)

Exhibit 6-P contains statements of account prepared in the form and style used by the Bank of Salt Lake during the year Globe operated. The statements in the Exhibit were in the name

of Globe Leasing. The ending balances on the statements didn't reflect overdrafts. (Tr Vol. II at 23)

The deposition of Mr. Perry was filed and published. (Tr Vol. II at 23, 24)

Mr. Perry reviewed Exhibit 6 and the exhibit did not indicate that checks had been rejected by the Bank as being drawn on insufficient funds. Mr. Perry assumed that if a check had been returned for insufficient funds, it would have appeared on the bank statements. The summary on the front of Exhibit 6 was prepared by Mr. Weigelt and shows the ending balances of each month. Exhibit 6 was received into evidence subject to a reservation of Mr. Kipp's with respect to the fact that the summary sets forth Mr. Weigelt's representation of the totals. (Tr Vol. II at 24-26)

Mr. Perry left the Bank of Salt Lake in late July of 1974. At the time Mr. Perry left, the Bank had not received confirmation of insurance coverage on some of Globe's files. (Tr Vol. II at 26-27)

Mr. McRae offered Exhibit 1-P to the Court. Mr. Kipp objected to the admission on the grounds that there was no proper foundation. Objection was sustained. (Tr Vol. II at 27)

Mr. Perry testified that the form contained in Exhibit 11-P represented the insurance coverage that was placed on the

leased automobiles. Said form was filed with the Bank of Salt Lake with each lease presented by Globe. Insurance requirements were the same for each lease. The requirements were that Globe Leasing was to provide insurance coverage to meet state requirements. Mr. Perry didn't know if the portions of Exhibit 11-P entitled "Liability Limits," "Additional Insured," and "Loss Payee," were completed with each lease. The insurance verification for each lease was generally signed by Mr. Weigelt indicating that insurance coverage had been obtained and checked by Mr. Weigelt. Mr. Perry claims he tried to get Mr. Weigelt to send the originals of the insurance policies to the Bank. Mr. Perry wasn't concerned with the standards of the industry, he personally wanted original copies of the policies on file. Mr. Perry admitted that the Bank was effectively covered with Globe Leasing holding the policies and the Bank named as loss payee. (Tr Vol. II at 27-30)

Mr. Perry stated that Globe Leasing made up their own payment books for the lessees and collected their payments independent of the Bank. Globe deposited the moneys that were received into its accounts at the Bank. After the money was deposited, the Bank would debit the account when the payments were due. (Tr Vol. II at 30-31)

Globe's reserve account at Bank of Salt Lake was carried as a checking account. However, no checkbook was issued

on that account, nor did the Bank pay interest on that account. Mr. Perry testified that he and Mr. Weigelt jointly agreed to create the account shortly after the Bank began financing Globe's leases. (Tr Vol. II at 31, 32)

Mr. Perry's deposition was published. In his deposition, Mr. Perry had stated that 3 1/2 percent was put into the reserve account. He couldn't now specify, however, from which sum that 3 1/2 percent figure was computed. As far as Mr. Perry could recall, nothing was ever charged against the reserve account. (Tr Vol. II at 32-34)

Globe Leasing paid the property taxes and procured the license plates for the leased vehicles. (Tr Vol. II at 34)

Mr. Perry wasn't sufficiently familiarized with the procedures of the leasing office to take the Court through the procedures followed by the Bank in handling a lease after an individual lessee's credit had been approved. (Tr Vol. II at 34, 35)

After a lessee's credit had been approved and after receiving the completed documents from Globe, Mr. Perry would receive notification as to how much was to be financed for the car. (Tr Vol. II at 35)

Exhibit 12-P was identified by Mr. Perry as containing the lease computation worksheet and lessor financing computation worksheet; two inside documents. Mr. Perry would receive these

documents in a completed form as part of the application for credit. Line 34 Exhibit 12-P indicates the amount advanced to Globe by the Bank. Those amounts should be evidenced by the credit advices in Exhibit 7-P. (Tr Vol. II 35, 36)

Mr. Perry at one point, discussed with Mr. Weigelt the various types of interest to be charged to Globe Leasing on the accounts. They worked with a straight dollar add-on interest. The contracts had balloon payments. A balloon payment is a lump sum that's due at the end of the term of a loan. The same interest rate was applied to the balloon payments but it was computed differently. The Bank determined the interest rate on the leases. (Tr Vol. II at 35-37)

Line 39 of the Lease Financing Computation Worksheet represents the number of payments due and the amount due monthly from the lessee. As far as Mr. Perry could recall, the Lease Financing Computation Worksheet also computed the total amount the lessee would pay to Globe. It didn't include the amount of the residual on the car; or the balloon payment to the Bank. (Tr Vol. II at 37-39)

Mr. Perry explained "residual" to mean the amount paid at the end of the lease after the automobile is returned by the lessee. He stated that the balloon payment and residual are the same thing. (Tr Vol. II at 39)

The lessee's payments were calculated by Globe Leasing on the lease. The payments to the Bank were calculated by the Bank. Globe's payment to the Bank was lower than the lessee's payment. The Bank arranged for Globe to remit the amount of the lessee's payment contained in Exhibit 12, Line 29. As far as Mr. Perry could recall, the excess remittance included the 3.5 percent of the payment. The net effect of paying more than the lease payment was to build a reserve account. (Tr Vol. II at 39, 40)

If any of the leases had been defaulted, it would have been Globe's responsibility to repossess the car. Globe was also responsible for collecting late payments by the lessees. (Tr Vol. II at 40)

Mr. Perry was not aware of any promissory notes on the vehicles from the lessee to the Bank. Globe Leasing was responsible for titling the cars. To the best of Mr. Perry's recollection, the title certificates were issued to Globe Leasing with Bank of Salt Lake as the lien holder. (Tr Vol. II at 40, 41)

Exhibit 13-P contained copies of the leases sent to the Bank. As far as Mr. Perry could recall, the Bank received a copy of each and every lease. (Tr Vol. II at 41)

As far as Mr. Perry knew, Globe made payments to the car dealers for the purchase of the vehicles. Mr. Perry recalled

discussing with Mr. Weigelt that Mr. Weigelt was trying to pick up some front money by financing the vehicles at 110 percent of Globe's cost on a vehicle. The discussion occurred close to the time that Mr. Perry's association with Globe Leasing was coming to an end. Mr. Perry now states that he has no independent recollection of the financing arrangement of 110 percent. (Tr Vol. II at 41, 42)

The monthly debit made by the Bank was credited to the individual lease account to keep them current. The money was taken out of the Globe account and credited to the installment loans. (Tr Vol. II at 42, 43)

As far as Mr. Perry knew, Globe was purchasing the vehicles since the title was issued in Globe's name with the Bank as lien holder. (Tr Vol. II at 43)

At one point, Mr. Perry had a discussion with Mr. Parker wherein Mr. Parker gave him the exact amount which he was to loan as a trial with respect to Globe's leases. Mr. Perry testified that no decision was every made to exceed the amount established by Mr. Parker. Mr. Perry, however, was never told not to continue financing the Globe leases. Mr. Perry didn't know how much the installment loans had accumulated to at the time he left the Bank. He was aware that it was over $150,000. (Tr Vol. II at 43, 44)

Exhibit 14-P was identified by Mr. Perry as the "Assignment of Lease" form. To the best of Mr. Perry's knowledge, a copy of that assignment accompanied each and every lease that Globe entered into with its customers and was included with the packet of documents received by the Bank from Globe. Mr. Perry testified that the assignment assigned all right, title and interest in the lease to the Bank. Mr. Perry agreed that this was done as a security device in the event of Globe's default. Mr. Kipp objected to the last two statements by Mr. Perry and the objection was sustained. (Tr Vol. II at 44, 45)

During the 12 month period that Mr. Perry was involved with the Bank and Globe Leasing, the Bank never, to Mr. Perry's knowledge, exercised any of its options which it conceivably could exercise under Exhibit 14-P; nor did the Bank ever transfer the ownership of any vehicle on which it held a security interest and on which Globe Leasing was the title owner. During the time that Mr. Perry was at the Bank, the Bank never caused any financial statements to be filed with the Motor Vehicle Department indicating that it was anything other than a lien holder. Mr. Perry was not aware of any overt gesture made by the Bank of Salt Lake to remove Globe Leasing as the title owner of any vehicle. Mr. Perry knew of no time prior to July 15, 1974 that

the Bank of Salt Lake ever served notice on any lessee of Glob Leasing of the assignment contained in Exhibit 14-P. Mr. Perry testified that the Bank didn't really care what happened to the cars as long as they got their money. (Tr Vol. II 45-47)

In his deposition, Mr. Perry was able to recall that the Bank of Salt Lake had financed close to $390.000 worth of Globe's leases. At that point in time, Mr. Perry didn't consider the individual lease contracts to be loans by the Bank of Salt Lake to Globe Leasing. During his deposition, Mr. Perry had stated that, in essence, all of the loans from Bank of Salt Lake were to Globe Leasing rather than the individual lessees. Mr. Perry now states that in his mind he was dealing with individuals. (Tr Vol. II 47-48)

Mr. Perry received the Lease Computation Worksheet an Lessor Financing Computation Worksheet contained in Exhibit 12- in connection with each new lease deal. That document reflecte the amount of money the Bank paid on the proceeds of the lease. As far as Mr. Perry knew, it also reflected how much Globe was going to get from the lessee and how much was owed on the end o the lease. If more were owed on the car than the car was worth at the end of the lease, Globe would have paid that. If there were less owed than the amount of the balloon payment, Globe would have been entitled to that. (Tr Vol. II 48, 49)

At the inception of Globe's proposal to Bank of Salt Lake, Mr. Perry received some financial statements from Mr. Weigelt. The statements were not very extensive. Mr. Perry did not recall receiving or requesting any corporate financial statements from Globe Leasing during their period of operation. (Tr Vol. II at 49, 50)

CROSS-EXAMINATION OF MR. PERRY BY MR. KIPP:

Mr. Perry gave his deposition in this case under subpoena served upon him in connection with the proceedings. (Tr Vol. II 50, 51)

When Mr. Parker discussed the Globe leases with Mr. Perry initially, he said something like "let's try a few and see how they work." The arrangement at that time was that if the lessee didn't meet the Bank's credit criteria, the Bank would not take the lease. Mr. Perry turned down about a third of the leases during the course of his handling of the Globe account. Mr. Parker had initially instructed Mr. Perry to try $35,000 or $40,000 worth of Globe leases. (Tr Vol. II at 51, 52)

As the arrangement between Globe and the Bank of Salt Lake progressed, Mr. Perry became aware that Globe was adding ten percent to the price of the vehicles when they obtained financing for the vehicles. Mr. Perry objected to this procedure when he became aware of it. Mr. Perry voiced his objection to

the procedure toward the later stages of the series of transactions. (Tr Vol. II at 52)

Mr. Weigelt was aware of the 3 1/2 percent that was being placed in a reserve account and never demanded those fun from Mr. Perry.

Globe never signed any promissory note to the Bank. They did sign an assignment of lease. Mr. Perry, in authorizi the advance of funds to Globe, relied on that assignment and i terms. The various documents prepared for the lease transacti were basically Globe instruments. The assignment was a Globe instrument. (Tr Vol. II at 53)

Mr. Perry, during his dealings with Globe, relied up Globe to make the calculations of the residual at the end of t lease and to try and predict what the car would reasonably be worth at the end of the period. Mr. Perry had no expertise in that area. (Tr Vol. II at 53, 54)

Mr. Perry did not obtain further authority from Mr. Parker to increase the amount of money used by the Bank of Salt Lake to finance the lease for Globe. (Tr Vol. II at 54)

Of all of the Leisureamerica leases approved by the Bank of Salt Lake, Mr. Perry approved only one. Mr. Perry had told Mr. Weigelt that he would try one of the Leisureamerica leases, but the rest were not approved. Mr. Perry is aware

that five or ten vehicles were eventually leased to Leisureamerica. Mr. Perry was not aware of other officers in the Bank approving the Leisureamerica leases. Mr. Perry testified that the credit of Leisureamerica was not acceptable at the time of the leases. They did not meet the requirements of the Bank. (Tr Vol. II at 54-56)

Mr. Perry had dealt with the financing of motor vehicles in the past and does not consider it good banking practice to advance and hundred and ten percent of the full purchase price of a vehicle. (Tr Vol. II at 57)

Mr. Perry was not aware of sums identified as security deposits that were made by lessees to Globe on the individual leases. Mr. McRae stipulated that security deposits were not paid over to the Bank of Salt Lake from Globe Leasing. Mr. Perry was not aware of any first payments paid by lessees to Globe under the leases that were not paid over to the Bank. This procedure of not paying the funds over to the Bank was not in conformity with the agreement between the Bank and Globe. (Tr Vol. II at 57, 58)

Before Mr. Perry left the Bank of Salt Lake, he was never successful in obtaining all of the original insurance documents from Globe to complete his files. He testified that it is the usual practice in the banking business to acquire original evidence of insurance on financed vehicles. One wouldn't ordinarily rely upon the borrower or dealer on that subject.

The Bank would want the insurance to include physical damage coverage on the vehicle to preserve their security. (Tr Vol. at 58, 59)

Mr. Perry was aware that the assignment document provided among other things that the Bank could collect payments from the lessee. He said that he relied on that provision in making the lease transactions. (Tr Vol. II at 59)

In the computer runs and other accounting and printou data, there was an identification number assigned to Globe to enable the Bank to perform summary accounting. Each individua lease was also specifically identified in the Bank's accountin and computer procedures. (Tr Vol. II at 59, 60)

It would not have comported with Mr. Perry's understanding of the Bank's deal with Globe if Globe had collected funds from a lessee in advance and not paid them over to the Bank. (Tr Vol. II at 60, 61)

REDIRECT EXAMINATION OF MR. PERRY BY MR. McRAE:

Mr. Perry testified that the Bank was concerned with where the money in Globe's account came from on the day of the month that the account was to be credited because the leases were drawn up between the parties involved and the payments we due from the lessee and no one else. (Tr Vol. II at 61, 62)

Mr. Perry has testified that Globe is the first leas company he has been involved with as far as the banking busine

is concerned. Mr. Perry has studied the terms of the lease contracts and understood that the first and last payments were collected by Globe at the time the lease was signed. Mr. Kipp objected to the line of questioning as leading; objection was sustained. (Tr Vol. II at 62, 63)

The installments are due on loans on the date stipulated on the loan which is usually a maximum of 45 days after the loan is set up. Mr. McRae asked further questions along this line and Mr. Kipp objected. Objection was sustained. (Tr Vol. II at 63, 64)

It was Mr. Perry's understanding that the assignment agreement was there to protect the Bank in the event of Globe's default. (Tr Vol. II at 64)

Loan applications were approved by the Bank with an initial on the Bank's loan application form. The Bank's form was prepared from the information obtained from Globe Leasing which was generally transmitted by telephone. Mr. Perry testified that he is sure some applications went through the Bank without approval. (Tr Vol. II at 64, 65)

The witness was shown Exhibit 15-P, the Leisureamerica files. Mr. McRae asked Mr. Perry to go through those files and identify those loan applications that showed the approval of credit by the Bank. Mr. Perry identified one loan application

in the file with his approval on it. Other of those loan appl tions were approved and marked with Mr. Perry's initials but someone else had marked Mr. Perry's initials. None of the Lea Computation Worksheets were approved. Mr. Perry went through t Leisureamerica leases one at a time indicating which worksheet were approved and which loans were approved. Exhibits 15 and were received into evidence. (Tr Vol. II at 66-75)

Mr. McRae has not identified Exhibit 16-P but asks t witness to give the date of approval with reference to that Exhibit. The date of approval would approximate the date on t worksheet. The date of the signature on that lease was May 16. Mr. Perry personally approved the credit of one of the Leisure- america leases which was executed on or about May 17, 1976. A that time, Mr. Perry and Mr. Weigelt discussed Leisureamerica. Mr. Perry was not aware that other vehicles had been leased to that company on or about that date. (Tr Vol. II at 75, 76)

With respect to the lease of a 1974 Ford Torino to Leisureamerica on May 8, 1974, Mr. Perry testified that he did not check his files to see if they had any other obligations t the Bank in approving that credit. He considers other obliga- tions when approving credit if he is aware of such obligations. At the time of the Leisureamerica leases, Mr. Perry did not as Mr. Weigelt for his personal guarantee on the "Leisure Home" (s lease. (Tr Vol. II at 76, 77)

Prior to July 15, 1974, no one ever told Mr. Perry that he was exceeding his instructions as Assistant Vice-President in the installment loan department in his dealings with Globe Leasing. (Tr Vol. II at 77, 78)

Mr. Perry's understanding of the loan limits at Bank of Salt Lake at the time of his deposition was that he couldn't loan more than 10% of the total capital to any one borrower. He stated in his deposition that this was never clearly defined to him. Mr. Perry testified during his deposition that if Globe Leasing were treated as an individual account, the Bank of Salt Lake would be in violation of loan limits under state laws. Mr. Perry could recall making these statements during his deposition. Mr. Kipp stipulated that the statements were from the deposition. (Tr Vol. II at 78-80)

RE-CROSS EXAMINATION OF MR. PERRY BY MR. KIPP:

During his period of employment at Bank of Salt Lake, Mr. Perry was the sole individual responsible for the Globe transactions. As reflected in the printouts, Mr. Perry perceived each lease as an individual purchase. Mr. Perry obtained financial data on Mr. Weigelt at the beginning of their association. He didn't consider Mr. Weigelt's personal guarantee to be substantial in light of his financial situation. (Tr Vol. II at 81)

"Nickie" worked under Mr. Perry at Bank of Salt Lake as Assistant Manager in his department. Mr. Perry testified that she "didn't necessarily" have the loan authority to approv the Globe transactions. Mr. Perry was the one responsible for extending the authority with respect to the Globe lease transactions. (Tr Vol. II at 81)

Some of the Leisureamerica leases were approved by Bank of Salt Lake during the absence of Mr. Perry. Had he been present, he would not have authorized disbursements on those transactions. (Tr Vol. II at 81, 82)

Mr. Perry did not rely on Globe's white worksheet in deciding whether or not to approve a loan. (Tr Vol. II at 82)

At the beginning of the association between Mr. Perry and Mr. Weigelt, there was never any discussion which suggested to Mr. Perry that Mr. Weigelt was relying on the Bank for all of his financing. (Tr Vol. II at 82, 83)

END OF EXAMINATION OF MR. PERRY.

Court closed after hearing argument by Mr. Kipp and Mr. McRae concerning the admission of Exhibit 14-P. The Court reserved judgment for a later time. (Tr Vol. II at 84-88)

AUGUST 4, 1976

DIRECT EXAMINATION OF NORTON PARKER BY MR. McRAE:

Norton Parker, from July of 1973 through July of 1974, was employed as President of the Bank of Salt Lake and in that capacity acted as chief executive officer. (Tr Vol. II at 89-90)

Mr. Parker became aware of the Bank's association with Leisureamerica when he reviewed the files of Globe Leasing. (Tr Vol. II at 90-92)

While Mr. Perry was on vacation, Mr. Parker noticed a striking woman who was in and out of the Bank quite frequently. He found out she was Mrs. Weigelt from other Bank employees. At that time he inquired regarding how much business the Bank was doing for Globe Leasing. He learned that the Bank was doing a great deal and immediately ordered Globe's files pulled for analyzing. The dollar value of Globe's contracts at that time was approximately $397,000. (Tr Vol. II at 92-93)

Mr. Parker is a former stockholder of Bank of Salt Lake. He owned, at one point, three percent of the outstanding stock or 330,000 shares. Other corporate officers who held stock in July of 1974 were Gerald Cannon, Bill Kelson, and Al Kelson. They are all currently still stockholders. (Tr Vol. II at 93)

Ten percent of Bank of Salt Lake stock held by officers was traded for Commercial Security shares. (Tr Vol. II at 93-96)

When Mr. Parker examined Globe's files, he became very concerned with the volume of money in one account. He was concerned, among other things, with the poor credit of Leisureamerica. Mr. Parker testified that if the extension of credit on the Globe transactions were considered extensions to individuals, the Bank didn't violate its loan limits. (Tr Vol. II at 96-98)

Mr. Parker reviewed Globe's files while Mr. Perry was on vacation. Mr. Parker outlined the steps he took after reviewing the loans as follows:

> "The first thing I did was notify the installment loan department to stop any further purchase of any leases, and they notified me there were three that had been presented at that time. I started our credit department analyzing the files in further detail as far as insurance and documentation and what have you, and instructed a typist to prepare letters of notification to the lessees to make payments to the bank."

Those letters are contained in Exhibit 9-P. Mr. Parker had read Exhibit 14-P prior to the time he sent the letter out. Mr. Parker was aware that Exhibit 14-P had been signed and that it indicated that it was collateral for the payment of funds. Prior to July 15, Mr. Parker checked to deter-

mine if any installment on any lease remained unpaid. He discovered that all installment payments were current to the Bank. Prior to July of 1974, Mr. Parker found that the installment loan files were last reviewed by Bank examiners in the fall of 1973 and by certified auditors at the end of 1973. (Tr Vol. II at 98-100)

As Mr. Parker reviewed the Globe leases, he found that Bank of Salt Lake had been listed as lien holder, and not the owner of the units in question. Mr. Parker was operating under the following section of Exhibit 14-P when he sent out the letters in Exhibit 9-P:

> "For good and valuable consideration, to wit paid by Bank of Salt Lake to sell, assign, transfer and set over unto Bank of Salt Lake all and every rental due and owing or that may at any time become due and owing."

In sending out this letter, Mr. Parker was not attempting to take custody of the vehicles, he was merely asserting the Bank's rights to the lease covering the vehicles. At that time, Mr. Parker believed that Globe Leasing owed the Bank the security deposits they had received. (Tr Vol. II at 100-102)

Mr. Parker testified to not being even currently aware that Globe Leasing was handling the licensing or servicing the property tax payments on the vehicles covered by

the leases. Mr. Parker is aware that the registered owner gets the property tax notice. (Tr Vol. II at 102-103)

Mr. Parker became aware of the Bank's practice of issuing credit advices such as those in Exhibit 7-P, during the time he was reviewing Globe's files. He also became aware at this time of one of the documents obligating the payment of the sum due the Bank was a motor vehicle security agreement, a number of which are contained in Exhibit 19-P. (Tr Vol. II at 103-104)

Prior to the time the Bank began taking custody of the vehicles, the Bank never tried to have titles transferred to the Bank pursuant to the assignment provisions of the lease. Mr. Parker treated the assignment document primarily as an assignment of Globe's interest in the lease that caused payments to flow to the Bank, and secured by titles to the vehicle. (Tr Vol. II at 104)

Exhibit 2-P is prepared by Bank of Salt Lake setting forth payments by Globe to the Bank. It reflects late payments made by lessees. (Tr Vol. II at 104-106)

At the time of his investigation, Mr. Parker was advised that there were three leases in house to be purchased. Mr. Parker discussed these leases with Mr. Weigelt and he insisted that they had been approved by Jim Perry. Mr. Weigelt had purchased the cars and he told Mr. Parker that

it would be embarrassing not to process them. Mr. Parker confirmed this with Mr. Perry, then instructed the Bank to honor their commitment. Credit advices were subsequently issued to Globe's account. Mr. Parker later ordered a reversal of those credit advices after instructing Mr. Weigelt he was going to do so. Around July 15, Mr. Parker froze Globe's funds. (Tr Vol. II at 106-108)

Prior to December 31, 1974 when Mr. Parker left Bank of Salt Lake, he was not aware of the Bank executing any agreements with Globe's lessees to be a party to the lease agreements. (Tr Vol. II at 108)

Mr. Parker became aware of a second checking account of Globe's following his investigation. Upon finding the existence of that account, he impounded those funds. (Tr Vol. II at 108-109)

Mr. Parker was not surprised with the letters contained in Exhibit 22-P from confused customers. (Tr Vol. II at 109-110)

Mr. Parker wasn't sure if all Globe leases were approved by Bank personnel or not. (Tr Vol. II at 110)

Upon Mr. Perry's return from vacation, his resignation was solicited. He did in fact depart from the Bank thereafter. (Tr Vol. II at 110-111)

Subsequent to July 15, 1974, Mr. Parker attempted

to take custody of several of the vehicles described in the leases. Some of those transactions involved Leisureamerica. When he failed to recover units, he resorted to judicial processes. Mr. Parker didn't think this intervention interfered with Globe's customer relations. (Tr Vol. II at 111-113)

Mr. Parker's deposition was published.

Mr. Parker received an offer of payment from Sy Pendleton of Leisureamerica after they had discussed the return of the vehicle. Mr. Parker was not and is not currently aware that Mr. Pendleton had already made a payment to Globe at that time and stopped payment on the check in confusion. (Tr Vol. II at 113-116)

Mr. Parker never mailed a copy of the assignment under which he was laboring to any of the lessees. (Tr Vol. II at 116)

Mr. Perry's termination was solicited because he didn't follow instructions. (Tr Vol. II at 117)

When Mr. Parker took steps to take control of Globe's lease payments, he wasn't aware of any profit margin which was built into the lease payment by Globe. He was aware of the overages in the accumulation of the paid installments as it would inure to the retirement of the balloon payment at the end. (Tr Vol. II at 117-118)

Mr. Parker agreed that Globe's cash flow was cut off when the Bank took custody of the leases to the extent that Globe was previously using their cash flow for purposes other than making payments and to the extent that the Bank stopped purchasing leases. Mr. Parker testified that cash flow is important to a banker in reviewing a potential customer. Volume of paid new business is also important. (Tr Vol. II at 121-122)

CROSS-EXAMINATION OF MR. PARKER BY MR. KIPP:

Mr. Parker believes that the fact that Globe had sold a substantial number of leases to Bank of Salt Lake was a positive factor for Globe with respect to other bankers. He believes that Globe was more susceptible to a bank's favor in July of 1974 than July of 1973. Mr. Parker believes that Globe would have had a difficult time getting their leases financed in 1973. (Tr Vol. II at 122-123)

Loaning a hundred and ten percent of the purchase of a vehicle is a "no-no" in banking practice. The usual approach is to loan 80-90% of the purchase price. (Tr Vol. II at 123)

With transactions such as Globe's the Bank usually purchases the lease, notifies the customer, and has the payments flow directly to them.

Mr. Parker relied on the following portion of the

assignment of lease when he directed the lessees to pay the Bank:

> "Said Bank of Salt Lake is authorized and impowered to collect all sums of money, principal due, or that at any time hereafter may become due and owing as rental under the provisions of said lease, and to receipt therefor as fully and completely and for all purposes as the undersigned might or could have done had this assignment--."

Mr. Parker relied in general on the terms in the assignment of lease. As a successor of Globe, the Bank had an assignment of all right, title and interest to all elements of the lease, including the vehicles. Mr. Parker was successful in getting Globe's security deposits over to the Bank so that they would be available for the lessees. (Tr Vol. II at 124-125)

When Mr. Parker ran across the Leisureamerica files, he had substantial concerns about the transactions with that company. He explained his concern as follows:

> "Well, number one, it was the large concentration of credit with basically one entity that was represented by two names, Leisureamerica and a subsidiary or affiliate of some sort; basically one entity representing, as I recall, 14 or 15 automobiles and trailers. It was a new organization with a highly inflated financial statement that was very obviously a land promotional-type of operation with no current assets to speak of, and not a creditworthy account for that amount of money."

The delinquencies in these payments concerned Mr. Parker. Mr. Parker described what he found upon review of the

Leisureamerica documents as follows:

> "There was a lack of insurance on all the vehicles. I can't recall whether any of those titles were missing or not. The financial information was inadequate. As to the make up of the corporation, we couldn't determine who was president and who the board of directors was and the date of organization and this type of thing.
>
> "The actual loan worksheets, there was a question as to whether they had individually been approved by our installment loan department, Jim Perry, in that his initials were missing on several of them."

Mr. Parker believes the Bank was financing excessive cost. Mr. Parker outlined the steps the Bank would ordinarily take under such circumstances as follows:

> "Number one, try and solidify the loan by obtaining insurance coverage, obtain more information about your borrowers, and frankly policing it a little tighter until it had a chance to age."

Mr. Parker eventually obtained possession of some of the Leisureamerica vehicles. He had to threaten judicial action to obtain them. He stored the vehicles at Laury Miller Pontiac and they were stolen. Leisureamerica didn't attempt to bring their leases current. Legal process was undertaken with respect to some of the leases. (Tr Vol. II at 125-128)

Eight of sixty-four lessees complained about the transition of making payment from Globe to the Bank. (Tr

Vol. II at 128)

When Globe's account was frozen, they had a total of $3,500 in their accounts. At the time the accounts were frozen, Mr. Parker became aware of the double financing matter at Valley which involved a $4,000 lease. At the time the account was frozen, Mr. Parker was aware that security deposits had been retained by Globe totalling $11,000. He was also aware that insurance documentation was absent from the files.

Mr. Parker testified concerning the procedure of requiring proof of title before payment to the dealers for the last three leases honored as follows:

> "I had not been aware that we had been crediting Globe's account as we purchased these leases, and that almost simultaneously an overdraft check came to my attention drawn to the Ford dealer down in Provo by Globe Leasing, which had insufficient funds to cover. It was obvious that if we deposited the funds on the three leases we had just purchased to cover that check, then there wouldn't be funds to cover the checks drawn to purchase the cars for those three leases.
>
> "So, I had them reverse the charges, notify Globe Leasing that we were insisting on paying for these leases with a cashier's check made payable jointly to Globe and the dealer to ensure that we would receive the title. Globe refused to take delivery of the cashier's check. And some time subsequent to that, counsel employed by both sides and you negotiated a procedure with their counsel where the dealer would bring

> the manufacturer's statement of origin and the proper documents to us and certify that they would deliver title to us and we would honor Globe's check from the proceeds of the lease."

Mr. Parker testified that he agreed to honor the last three leases because Perry had agreed to buy them and the Bank honors their commitments. Simultaneously, Mr. Parker gave written notice to Globe and thereafter the Bank purchased no more leases. Mr. Parker testified that he has done nothing to injure Globe's chances of getting financing at another bank. (Tr Vol. II at 129-132)

The lease accounts were very unprofitable for the Bank of Salt Lake. Mr. Parker described the circumstances as follows:

> "In addition to the losses taken on the sale of and disposal of the Leisureamerica cars, and of course the legal expense of recovering them after they had--of recovering them, we had two or three others that defaulted on their lease in the process, and we suffered losses in disposing of the vehicle."

At the time Mr. Parker left Bank of Salt Lake, none of Globe's leases had produced any profit to the Bank or Globe. (Tr Vol. II at 132)

Exhibit 30-D is the written notice written by Mr. Parker to Globe terminating the arrangement. Exhibit 30-D was admitted. (Tr Vol. II at 133)

The Bank lost about $20,000 on the Leisureamerica

leases. They lost about $2,000-3,000 on other leases. (Tr Vol. II at 133-134)

REDIRECT EXAMINATION OF MR. PARKER BY MR. McRAE:

Many people lost money on Leisureamerica. (Tr Vol. II at 134-135)

Mr. Parker agreed that Globe couldn't do much about a delay in the State sending title to the Bank; that is, if titles were missing from the files as a result of a delay by the state. (Tr Vol. II at 136)

DIRECT EXAMINATION OF KENNETH M. STATS BY MR. McRAE:

Kenneth M. Stats; assistant vice-president of Commercial Security Bank of Salt Lake. In July of 1974, Mr. Stats was in the commercial lending end of the business. He is also manager of the credit department. Mr. Stats is qualified to testify on the repossession of Leisureamerica equipment. He and Mr. Perry reviewed all of the Globe Leasing files during the time Mr. Perry was on vacation. (Tr Vol. II at 136-139)

CONTINUED DIRECT EXAMINATION OF MR. PARKER BY MR. McRAE:

Mr. Parker identified his signature on Exhibit 31-P. Within a few days prior to the date of the exhibit, Mr. Parker discovered the location of the encumbered title to the Pontiac at Valley. Exhibit 31-P was admitted. (Tr Vol. II at 140-141)

Whereupon, a brief discussion between court and counsel occurred and the court recessed. (Tr Vol. II at 141-142)

AUGUST 5, 1976

Court opened with the following statement by Mr. Anderson:

"First of all, your Honor, as an additional ground for the objection made, the summary Exhibit 18 is a parodying of the evidence that's in the various files. But it's based upon documents outside the record. I think under the authorities with which the Court is well acquainted it's improper and improper to be submitted to the Court for the basis of this matter.

"With regard to the matter of the speculative damages, I have reviewed the cases which will be referred to in a short while I'm sure by Mr. McRae. The key case I guess he's basing his claim upon is the Randy's Datsun case which was decided in April by the Tenth Circuit.

"There is a whole raft of Utah cases which are precedent and binding upon this Court, and in those cases the clear holding throughout those cases is the damages for anticipated profits contingent upon many uncertainties are speculative and are thus not recoverable and are not proper matters to be considered by the Court.

"With regard to the cases I would cite the Van Zyverden case; Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468.

"In that case, the Utah court stated--and by the way that's a 1964 case--the court stated,

> Under the well settled rule that damages for anticipated profits are contingent upon so many uncertainties that they are speculative and therefore not recoverable... the trial court was justified in rejecting the offer and

> holding that the Van Zyverdens had proved no damage.

Other cases which stand for the same proposition, Weber Basin Water Conservancy District v. Braegger, a 1959 case, 334 P.2d 759, 8 Utah 2d 346. A case, State of Utah v. Tedesco, a condemnation proceeding case in which they got into the future profit-speculative issue, 291 P.2d 1028, 4 Utah 2d 248.

"The--another condemnation case, a 1957 case, State Road Commission v. Noble, 6 Utah 2d 40, 305 P.2d 495. And in that case the court noted again the general rule; referred to a section in the treatise on Eminent Domain by Nichols, and noted,

> In view of the contingencies and uncertainties of business in general, there can, in such case, be no certain estimate of the cost and potential profits.
>
> The courts have generally rejected these attempts to introduce into evidence the various forms of earnings and profits...

The court has gone into the same matter in a couple of recent cases after the Van Zyverden case. A case in 1972 of Monter v. Kratzers Specialty Bread Company, 29 Utah 2d 18, 504 P.2d 40. There again it was speculative loss of profit situation.

"And there we have a situation where the Kratzer Bread Company had been closed up, and in an unlawful detainer-type action they came in claiming all kinds of damages based upon a projection that Mr. Stuart is going to come up with in this case covering a long period of time; potential profits based upon past sales and past record of sales with another baking company, Continental Baking.

"The court said that was improper and that there was no basis for it; cited the other cases which I've referred to, and held that it was an improper measure to get into the speculative profits and earnings.

"Another more recent case is the Howarth case, Howarth v. Ostergaard, 30 Utah 2d 183, 515 P.2d 442, a 1973 case. That again gets into the speculative profit situation in which they were speculating about a Christmas tree business having to do with purchase of a piece of property and what they were damaged by because the purchase didn't go through and some speculative business that was being talked about.

"The court held that it was improper and again referred to the basic rule which was

> The basic and general rule is that loss of anticipated profits of a business venture involve so many factors of uncertainty that ordinarily profits to be realized in the future are too speculative to base an award of damages thereon.

Reference is also made in a footnote of that case to Van Zyverden case and other cases I've cited, and further to a general statement in 22 Am Jur 2d 243.

"I could go on and cite cases from various other states. The law I feel is quite clear. It's improper in this kind of a situation to get into the many speculative features of the uncertainty which is involved. I would submit it to the Court on that basis (Tr Vol. II at 143-145)

Mr. McRae responded to Mr. Anderson's statement as follows:

"The theory of this lawsuit, the principal two theories are (1) the business slander and

(2) the breach or interference with business contract, as the two may be possibly differentiated.

"Now, the case law--and there are no cases in Utah on this subject--principally the case law that we find covering these two theories of recovery arise out of antitrust situations or credit situations. And I would like to tender to the Court--I did not have this case last night--but it is Gustafson v. General Motors Acceptance, 337 F. Supp. 406, having to do with (1) a cause of action, and (2) the method of calculating the damages.

"In these types of cases, as the Court would have noted in reading them, the law very jealously protects the corporate image against (1) slander and defamation and (2) the continued right of operation.

"Now, in Bunnell v. Bills, our court in one sentence--that's a 13 Utah 2d case--in one sentence seems to imply or state that in business slander there is a cause of action.

"At no place in Utah law do we have any measure or method of calculating the damages when, as we have according to our version of the evidence in this case, shown that the inference with contract and/or the slander under the definition of business slander or libel has effectively terminated a corporate operation.

"And the effective termination of this operation and resultant damage to the corporation because of the effective termination from sending out the letters contending an assignment, demanding--and I submit this is one lawyer's view--wrongfully the security deposits as they were not, according to our Supreme Court, part of the assignment. And I submit that the assignment is a security device in the event of default.

"Now, the Court must keep in mind that our theory of this case is that at the time of the

wrongful act--the wrongful act being the letter of July 15th, 1976--or, '74, I'm sorry--the corporate plaintiff was in good financial standing with the defendant bank.

"And according to the Texas authorities that I gave the Court, plus the case that seems to be the hub case, delinquent payments are the basis of determining breach of credit. And breach of credit, then, under Article 9 of the Uniform Commercial Code, becomes the basis for taking the relief back.

"Now, this general theory, taking this one step further now--since we have in Utah law no Utah law, and most of the cases that deal in this subject are anti-trust cases--we must then necessarily revert to Federal case law.

"I agree that Utah has held innumerable times that speculative damages are not awardable. That is the law.

"But I submit that in the case of business slander or tortuous interference with business contract resulting in termination or loss to the business, the case law now in at least three jurisdictions is that there is and must necessarily be a method of compensating the corporation for the damage done.

"And in the Pugeot case, Randy's Datsun case, and the Gustafson case, an arbitrary ten year projected growth based upon reasonable economic theories based upon analysis and evaluation of the personnel, the business practices, the economy as it has been cycled since the history books started being written, and of course taking into consideration the day of the alleged act and the subsequent economic changes up until the day of trial, that this is a legitimate and bona fide method to compensate a corporation for any wrong that it may have suffered.

"Now, if there was no legitimate method of compensating a corporation for damage done, then in this case the money mongers would be free to do as they darn well please with their customers,

with their clients, and with the people they engage in business with; as with any other person interfering with the contractual rights of a member of the public.

"If one is limited to proving specific loss of profit or gain on a specific contract, then a person such as the Bank of Salt Lake through its president does not stand the risk of malice, express or implied, or gross negligence in summarily closing a business.

"And that is the net effective result, and I proffer to the Court that though there is evidence that the Bank of Salt Lake had the right to terminate lending funds at its discretion on written notice, that this witness is capable of testifying from the foundation heretofore laid or that could yet be laid that Mr. Weigelt may have had a rough time for the next 60 days because of the interest market in the summer of 1974, but within 90 days a complete turnaround happened, and what was 12 percent Federal money became five percent Federal money, and the car business took off again like gangbusters, and there was money in the banks.

"Now, there has to be some way in our law to compensate a business for being effectively closed, what we submit in a wrongful fashion, and if the courts have to take this particular, unique type of tort or torts out of how many cows a person is going to be able to run on their farm in an eminent domain case, if they have to take this case outside--or, if they want to see breach of contract since you didn't put in a liquidated damages clause, that's one thing.

"But I think that the jealousy of which the case law looks at this type of tort, or the jealousy of the courts towards this type of a tort and the protection of business reputation and the right to do business necessarily takes this out of the type of situation that our Supreme Court has ever faced. (Tr Vol. II at 146-149)

The argument continued in the transcript as follows:

"MR. ANDERSON: Your Honor, just a couple of brief statements. We accept Mr. McRae's statement that the bank can terminate lending of funds under the letter agreement which was existing, and I assume by that that he's dismissing the first four counts of his complaint which seem to be predicated upon that theory; is that correct?

"MR. MCRAE: No, if you follow these--well, I--go ahead. I don't--I didn't mean to imply that. But go ahead with whatever statement--.

"MR. ANDERSON: I thought you accepted the fact that there was a letter agreement which provided that it could be terminated upon notice, and that in fact notice was given. And it seems to me that the first four or five claims are predicated upon some kind of wrongful termination of credit.

"So, with your statement on that point, I guess those counts are out, and we would be happy to accept that at this time.

"MR. MCRAE: Well, my evidence would show through this witness that that termination under these circumstances and in the manner in which it was done constituted gross negligence.

"Now, you can do what you want, but you could still be civilly wrong for doing it within the industry standards that constitute gross negligence.

"MR. ANDERSON: Your Honor, I don't want to go far afield from the rather limited issue which I thought that I was to argue under the law at this point. But I thought we should clear up in fact--if in fact it's agreed that the termination was appropriate and that notice was given--.

"MR. MCRAE: I don't agree the termination was appropriate. I do agree notice was given. Who can rebut the exhibit?

"MR. ANDERSON: With regard to speculative damages, which I tried to confine my arguments to on the law, I'm happy that Mr. McRae cited the Bunnell v. Bills case, 13 Utah 2d 83, because that case he said there's one sentence in it that refers to the kind of business wrong he's talking about here.

"But there's also another sentence which is most appropriate, and as far as Mr. Stuart's testimony is concerned that's the statement found in the last line of Page 89 going over to Page 90, and that is "damages cannot be found from mere speculative and conjectural evidence."

"With regard to the other statements that Mr. McRae made, I think that those are probably appropriately taken up at the close of this case. I think that the statement about money mongers and malice and these other things we'll address at the appropriate point. But I don't think they're appropriate at this point.

"MR. MCRAE: Well, I have to analogize this type of testimoney and evidence, Judge, to the same type of evidence that a doctor gives when he's on the witness stand.

"If this man is an expert, then within reasonable scientific--or, reasonable, economic probabilities he ought to be able to testify within the realm of reasonable scientific standards, to wit the science that he has perfected or that he has been engaging in for the last 20 years.

"Now, a doctor can't tell you or me how long with ordinary wear and tear my back will continue to function within the realm of reasonable medical certainty. He can't.

"And my questions will be posed to this gentleman within the realm of reasonable economic certainty based upon a total analysis of the business world, financial market, the automobile business, the industry standards, and

the national economy as best as in hindsight and in foresight can be projected. (Tr Vol. II at 149-151)

Further proceedings were had and transcribed elsewhe

(Tr Vol. II at 152)

AUGUST 6, 1976

Proceedings commenced with a motion for dismissal of the plaintiff's complaint on each count thereof. Mr. McRae responded and the Motion was taken under advisement by the Court. The Court also denied an earlier Motion by Mr. Kipp to strike certain testimony. (Tr Vol. II at 152-156)

Mr. Kipp made another motion as follows:

> "I would move that in the event the Court considers damages in this matter, that the prayer of plaintiffs' complaint under the theory of tortuous (sic) interference with contract be limited only to the existing contracts with which the evidence might be found to show some interference.
>
> "And I think under the law that that would be the limit of damages, and there could be no award for any loss of future contracts. That cause of action must be specifically limited to the damages sustained as a result of the existing contracts with which the defendant might be found to have interfered.
>
> "And I do move that the damage consideration be restricted to that under the state of the evidence at this time, and then I'll not urge that further, your Honor. But I did want to make a record of it."

The Court took that Motion under advisement. (Tr Vol. II at 156-157)

DIRECT EXAMINATION OF LARRY E. BENSON BY MR. EYRE:

Larry E. Benson; 1655 S. 35 E., Bountiful, Utah.

Occupied as Assistant Branch Manager for Valley Bank & Trust. Has been employed by Valley for 6 years. (Tr Vol. II at 157, 158)

Mr. Benson is acquainted with Globe Leasing and Mr. Weigelt. Valley made a loan to Globe Leasing on November 1, 1974 for $5,423. Mr. Benson dealt with Mr. Weigelt in consummating that deal. Globe Leasing gave a 1974 Pontiac Grand Prix to Valley to secure the loan. Exhibit 41-D contains a copy of the original note. Exhibit 42-D contains a security agreement signed by Al Weigelt pledging a 1974 Pontiac Grand Prix as security for Globe Leasing. Exhibits 41 and 42-D were admitted. Commerical Security Bank of Salt Lake made the last payment on that account in the sum of $3,156.95 on January 31, 1975. Valley Bank held the title on that loan in the name of Globe Leasing with Valley Bank & Trust shown as lien holder. Upon receipt of the $3,156.95, title was delivered to Commercial Security Bank of Salt Lake. (Tr Vol. II at 160, 161)

Mr. Benson became aware of the interest of Commercial Security Bank of Salt Lake in the Pontiac in November of 1974. Prior to that, he had been approached by Globe Leasing with regard to extending them credit for the assignment of leases Globe might enter into. Prior to this, he became aware of

the interest of Bank of Salt Lake in this automobile through a proposal made to him by Mr. Weigelt. Mr. Benson described Mr. Weigelt's proposal as follows:

> "Well, he submitted financial statements and a request that we purchase lease agreements on a limited basis. This was presented to the loan committee of Valley."

Mr. Weigelt's proposal was denied by Valley because the bank didn't think that the financial base of Globe was strong enough to support the dollar amount in collections. (Tr Vol. II at 161-162)

Mr. Benson is somewhat familiar with Leisureamerica. He became aware of the transaction between Globe and Leisureamerica in September of 1974 when Leisureamerica deposited $4,300 in Globe's account with Valley. The check was subsequently returned for insufficient funds. Mr. Benson didn't know what the check was for. He suggested to Mr. Weigelt that he submit the check for collection. The check was subsequently paid. The funds were credited to loans in the name of Globe at Valley. There were two loans in addition to the one on the Pontiac and both were in default at that time. All loans were paid off and Valley suffered no loss. (Tr Vol. II at 162-165)

Mr. Eyre asked the witness the following question:

"I show you a file No. 229488 in the District Court of the Third Judicial District in and for Salt Lake County, papers in the case of Valley Bank and Trust Company versus Alfred B. Weigelt, Gloria Morrison--Gloria Weigelt also known as Gloria Morrison, Globe Leasing Corporation, and ask if you're familiar with the facts which give rise to that lawsuit?"

The default on the loans at Valley by Globe gave rise to that lawsuit. Judgments in the sum of $5,717.09 plus attorney's fees and court costs were entered in against Globe. (Tr Vol. II at 165-166)

Mr. Benson has worked for another financial institution. He received a bachelor's degree in general education and a major in business. He is familiar with banking practices as they relate to commerical loan accounts. Mr. Benson didn't think it would be sound banking practice for a bank to accept a loan to an individual or a corporate entity which had previously financed or pledged the same collateral to another financial institution without disclosing that fact. (Tr Vol. II at 166-167)

Mr. Benson would be very concerned as a banker if he learned that a transaction or account he had purchased from a customer was based on a forged document. (Tr Vol. II at 167-168)

CROSS-EXAMINATION OF MR. BENSON BY MR. McRAE:

The aforementioned note on the Pontiac was in default after September 27, 1974. Another lease was in default in November of 1974. At the time of collection and crediting of the funds from Leisureamerica to Globe's account, the two loans which those funds were credited to were past due in excess of two days. At the time those funds were collected by Valley Bank, the problem between Globe Leasing and the Bank of Salt Lake had not come to light. In July of 1974, $4,000 was needed to release the Pontiac. Mr. McRae noted for the record that Globe Leasing had $6,000 in two accounts on July 31, 1974. (Tr Vol. II at 168-169)

Mr. Benson testified that it was not uncommon in the world of financing automobiles, for people who deal in cars to have their stock in trade financed with one lending institution, and then for various reasons to transfer one of those pieces of collateral to another lending institution. He further testified that a reasonable period of time is involved in paying off one lending institution and delivering title to the next lending institution. (Tr Vol. II at 169-170)

Mr. Fred Stringham is President of Valley Bank. At the time of the presentation of Globe to Valley, Mr. Stringham expressed the view that Valley didn't want to get involved with leasing companies. (Tr Vol. II at 170)

END OF EXAMINATION OF MR. BENSON.

DIRECT EXAMINATION OF MR. STATS BY MR. KIPP:

Kenneth Stats; 6585 Hickory Lane, Salt Lake City. Has been employed by Commercial Security Bank of Salt Lake for the past three and a half years. Is currently in charge of commercial lending at that bank. [Commercial Security Bank of Salt Lake and Bank of Salt Lake are one and the same entity.] Mr. Stats has worked in this capacity for 2-1/2 years. Mr. Stats outlined his responsibilities as follows:

> "The job includes both the approving of commercial lending or commercial loans to customers of the bank within my lending limits, presenting loan proposals to the loan committee of the bank, also the analyses of corporate accounts as to their financial strength, their ability to service indebtedness, and an overall evaluation, if you will, of people that borrow from the bank." (Tr Vol. II at 171-172)

Prior to the time Mr. Benson began working for Bank of Salt Lake, he worked with Dun and Bradstreet for 7 years first as a business analyst and later as manager of the service department. As a result of his experience, Mr. Benson is generally familiar with the practice of financial institutions. Specifically, he is familiar with the practice of banks with respect to commercial lending in all of its aspects. (Tr Vol. II at 172-173)

In July of 1974, Bank of Salt Lake impounded a total of about $3,800 from Globe's accounts. (Tr Vol. II at 173)

At the request of Mr. Kipp, Mr. Stats had selected three random leases from Globe's files to analyze for the Court. He evaluated the leases of Merrill Harward, W. W. Greene and Wilbur D. Wilhit. The Harward folder was marked Exhibit 43-D. The Harward lease was a 36 month net lease executed in October of 1973 on a 1974 Datsun pickup truck. Mr. Stats described this lease as a "typical Globe transaction." Since the date of the lease, the pickup truck was repossessed due to non-payment. The truck was received by the Bank in very poor condition. The body was damaged in several places. The car was valued on the books at $2,478.48 and the Bank was only able to get $1,500 for it. The low value on the vehicle in the NADA book was $1,975. The Bank ended up suffering a loss on that lease of $978.48. The Bank attempted to collect this sum from the lessee but was unsuccessful. Exhibit 43-D was admitted. (Tr Vol. II at 173-176)

The file of W. W. Greene was marked as Exhibit 44-D. The W. W. Greene lease was a net lease dated June 1, 1974 involving a 1974 Ford Elite. The car was returned to the Bank on May 28, 1976. It was a 24 month lease. Mr. Stats also considered this lease to be a "typical Globe transaction." When the automobile was returned, it was sold for $2,800 without repairs. Wholesale value at that time was shown as

$3,175. The Bank lost $153.91 on the lease. Exhibit 44-D was admitted. (Tr Vol. II at 176, 177)

The Wilhit lease folder was marked as Exhibit 45-D. Mr. Stats again indicated that this lease was a "typical Globe transaction." Mr. Stats explained the details surrounding this lease as follows:

> "This is a 36 month net lease dated May 24th, 1974. The car was a '74 Ford Country Squire Station Wagon. Subsequently Mr. Wilhit moved from the state of Utah to the state of Washington; had a great deal of trouble getting the car licensed in Washington without the signature of Globe; and there was some papers that the state of Washington asked be filled out and the signature of Globe Leasing or representative of Globe Leasing to sign."

When Mr. Wilhit was unable to get the car licensed, he returned it to the Bank on April 24, 1976. The Bank lost $761 on this vehicle. Exhibit 45-D was admitted. (Tr Vol. II at 177, 178)

At the request of Mr. Kipp, Mr. Stats prepared some summary accounting data relating to the Globe Leasing matters. At this point in time, some of the leases have run their term. Mr. Stats had all but two of the lease folders with him in Cou The vehicles covered by the leases which had run their term had been returned to the Bank. On the average, the Bank lost about $200 on each vehicle returned under the terms of the lea On the default leases, the loss was generally worse. Exhibit 46-D is the summation prepared by Mr. Stats for the period fr

August of 1974 through July of 1976 showing the total dollar outstanding on various leases purchased from Globe. It also shows the dollar amounts delinquent for the various months and the percentage of delinquency in terms of dollars. The summary was prepared from the books and records of the Bank of Salt Lake. Exhibit 46-D was admitted. (Tr Vol. II at 179, 180)

> "That is a reflection of a picture of the automobiles, the vehicles outstanding in conjunction with the Leisureamerica, Worldwide Management loans as of November, 1974, indicating what type of vehicle, the payoff amount as per the bank's records, the high value of the vehicle, as well as the low value as indicated in the NADA Book."

Mr. Stats would not loan a hundred and ten percent of the purchase price of a car. He didn't think any smart banker would. (Tr Vol. II at 181)

Mr. Stats continued with his explanation of Exhibit 47-D as follows:

> "Columns Nos. 4, 5, and 6 represent the name of the parties, where it's customary and was customary at that time to check values of automobiles for the possibility of selling the automobiles."

The final column indicates the amount that was actually realized from the sale of the vehicles. The summary was prepared from the books and records of Bank of Salt Lake and from the NADA Book. Exhibit 47-D was admitted. (Tr Vol. II at 181, 182)

If Mr. Stats had been involved in the Globe transactions, he would have been very concerned about the concentration of credit represented by the transactions involving Leisureamerica. It also would have upset him very much to learn that a vehicle which had been pledged to him as security for a loan had been previously pledged as security on another loan to another bank. Given these aforementioned conditions and the financial situation of Globe Leasing and the principals of Globe, Mr. Stats stated that it wouldn't be prudent for a banker to continue dealing with such an account. (Tr Vol. II at 182-183)

If Mr. Stats became aware that someone had assigned a lease to him which was forged and didn't cover any existing transaction, he would have consulted an attorney. In general, the bankers rely on the terms of the documents which are executed by their customers. The provisions in the assignment prohibit Globe from collecting or allowing prepayments to be made. He would have expected to receive any prepayments collected by Globe. (Tr Vol. II at 183-184)

Mr. Stats considered it not only common practice, but very prudent to have evidence of insurance on original documents. The same comment applies to the requirement of bank titles. (Tr Vol. II at 184)

CROSS-EXAMINATION OF MR. STATS BY MR. McRAE:

When Bank of Salt Lake sold the vehicles covered under the leases, they got bids from car dealers with used car lots. Mr. Stats agreed that the Bank is not in the business of selling cars; they leave that to the car salesmen. (Tr Vol. II at 183-186)

Mr. Stats testified that after July of 1974, the Bank undertook to put insurance on the alleged uninsured cars covered by the Globe leases. Some of the Leisureamerica leases were not insured in July of 1974. (Tr Vol. II at 186-188)

When Mr. Hildreth wired the $3,500 from his bank to Globe, his bank instructed Bank of Salt Lake to deposit those funds in Globe's account. (Tr Vol. II at 188-190)

REDIRECT EXAMINATION OF MR. STATS BY MR. KIPP:

Bank of Salt Lake lost approximately $23,000 on the Leisureamerica leases. (Tr Vol. II at 190)

With respect to the cars which the Bank had to dispose of, Mr. Stats stated that he ran ads in the paper to try and sell them for the best possible price. (Tr Vol. II at 190)

END OF EXAMINATION OF MR. STATS.

After the examination of Mr. Stats, Mr. McRae and

Mr. Kipp made argument to the court:

"MR. MCRAE: Your Honor, my position is relatively plain and simple in this matter. That is pursuant to the legal authorities that I've given the Court, the case law which I supplied the Court with and which you advise you have familiarized yourself with, it is our theory that the cause of action arises out of the acts of the bank on July 15th, 1974; that at that time, under the prevailing legal authority and case authority, that there had been no--the plaintiff was not in monetary default and that default in payment under Article 9 of the Commercial Code is the test as to whether or not the default remedies may be pursued.

"The other allegations of default are hindsight matters discovered after the damage is done. And the damage is irreparable damage, could not have been corrected under any circumstances with the--after the discovery of the other alleged default insofar as the Hildreth lease is concerned.

"The payments were at that time current. The allegation that--I mean, I find no credence in crediting of the $3500 back to Globe. I think that was a voluntary act on the part of the bank. The bank got the $3500. If they want to give it back to their customer, that's their privilege. But I can't justify the altered lease in the file. There's no way you can do it except to say it pulled the plug.

"I submit all the case authority in the case. I don't wish to belabor it. I expected to be here two days and we're on our fourth. With that, I submit it."

"MR. KIPP: Your Honor, Mr. Eyre's pointed out to me in questioning Mr. Stats I may have overlooked having him testify as to the exact amount of loss on the Hildreth lease in connection with our counterclaim. And I would--I'm not sure if the record is clear

about that or not; I thought it was. In any case, I move to reopen for that one item."

"THE COURT: You may do so."

"MR. KIPP: Mr. Eyre is looking for Mr. Stats. Perhaps I can proceed with my argument and I believe I can also be brief, your Honor. We've substantially argued the case during the course of its presentation to the Court, and I'll try not to belabor that.

"The guts of this lawsuit is No. 1 the bank had no duty to finance any amount to this borrower at any time, either as to number of leases or as to amounts. The borrower had every right to go somewhere else, and in fact did. He wasn't married to the bank, didn't feel any particular loyalty. He was getting his money where he could get it; went to Valley.

"He started out with three thousand bucks; not much money and with no business history. I think maybe we are entitled to credit. When he finished up with us he had a business history. The economist said it was a better deal than when he started. Maybe we should get some sort of compensation for enabling him to open his business.

"The transactions were governed by the terms of documents, all of which were prepared by Globe except the letter from Perry. The letter says either party could terminate on written notice. The bank did it and was entitled to. The assignment says what it says. Globe prepared it, they're bound by its terms, and it's construed in our favor. And it says they've assigned the lease, and they did. And it says we can collect the money and we tried. And it says they won't tolerate any prepayments and they did. That's what that says, and you can't torture some other reading out of looking at the last two lines and extrapolating that to the Uniform Commercial Code.

"Under any theory the bank acquired the lease. Mr. Weigelt says, 'Well, sure, that's what leasing companies do is finance or sell these leases, and the people, the lessees knew or should have known about it.' As a matter of fact, only eight out of 60 some leases made any kind of complaint, and that was not substantial as that file will reflect.

"We were also entitled, your Honor, under the terms of assignment to collect the payments, and did. And we're entitled under the Uniform Commercial Code to collect the payment, and tried to.

"The theory of security deposits and no default I think is bizarre. However, taking that as it really can be the only way they have got to go, the fact is that there was a default. There were several substantial defaults at the time that the bank took its action.

"No. 1, there was a double financed car which would scare a banker to death. That's what people who are not going to pay do. There was a forged, phony lease. There was a complete prepayment according to the undisputed testimony here.

"Interestingly enough, Mr. Weigelt says the Cadillac car was applied against that lease. However, I expect that the check register which is in evidence and before the Court will very likely show that Mr. Weigelt sent a check to Mr. Hildreth for that Cadillac.

"In this case the Cadillac was not employed on that lease. The Cadillac was purchased by Globe and later it was financed. The Naylor Ford title was absent the file. That's a default. There is no proof of insurance in the file. That's a default. The bank reasonably felt insecure. That's a default; exercised their rights.

"The bank is entitled to and in fact I think would have been subject to criticism by shareholders or by a bank examiner had they not promptly done what they did do. The plaintiff hasn't made a prima facie case of getting to the point of talking about the consequences of wrongful acts because they never bridged the matter of cause and the matter of fault or wrong-doing.

"On the matter of slander or libel or defamation, No. 1 it's got to be false. There's nothing false. No. 2, if we interfered with contract rights it would be only those that existed, all of which were losers.

"An interesting sideline to that, if I remember the testimony correctly about what these folks are making now, they're making now about two grand in their present jobs, which is more than they were making before; as an interesting sidelight to their claim for damages.

"Their company lost $1,900 through March. Their accountant figured up losses. Their president testified they didn't file a tax return because they had a loss. Then suddenly here comes a reconstruction expert who two or three--between two and three years after the fact looks back through his crystal ball and decides that they had lost two hundred thirty grand.

"There wasn't any damage by the bank's acts. The bank was entitled to collect payments on those leases, and they set about to do it. They would have the Court believe that the business of Globe ended because of the bank's act in protecting itself on some loans that needed more protection than there was available. However, their economist says they would have had a $12,000 minus cash flow during the last six months of 1974, and at that point in time their total assets were negligible or non-existent and their total source of funds to offset the $12,000 minus

cash flow were security deposits which they had to rip off the lessees and spend for their own benefit.

"They would have gone broke anyway, in any event, under their own economist's testimony. And that's what he said, 'unless they could get financing,' and they couldn't get financing before, during or after.

"Entirely aside from any dealings with the Bank of Salt Lake, Valley is here. They say that Globe applied to them. They didn't know about the Bank of Salt Lake deal. They didn't want them for good and valid reasons, both capitalization and the hazards of the car leasing business, as witnessed by the losses in this case.

"I'll comment on this and then I believe I'm done. To argue that the bank had the right to take a $3500 transfer of funds, where the transferring bank specifically directed the deposit of those funds in the account of a customer of the Bank of Salt Lake, is bizarre. They had no right but to follow the directions of the transferring bank, and they did follow them, and they got put in Globe's account. And of course the bank didn't know Globe had collected their money at that point, but they had no discretion in that matter.

"I submit, your Honor, that the argument I gave in connection with our Motion to Dismiss applies at this time, and the matter--the Court should find the matter in favor of the defendant on plaintiffs' complaint and in connection with defendants' counterclaim. And when Mr. McRae is finished, I will put that figure on."

"MR. MCRAE: I only would respond that Mr. Stuart testified to accrued gain of about $70,000. But, it's--this money had to buy this credit advice. This money had to have come to the Bank of Salt Lake for credit to that loan, which is the same loan number as Hildreth's.

"Now, the bank wants to credit it back, they want to take the money, then give it back to Globe, it was sent there for that purpose; that's up to the bank. And Carm and I will argue until one of us passes on, so I shan't belabor it further." (Tr Vol. II at 191-196)

CONTINUED DIRECT EXAMINATION OF MR. STATS BY MR. KIPP:

The Bank of Salt Lake sustained a loss on the Hildreth lease of $3,111. (Tr Vol. II at 197)

CONTINUED CROSS-EXAMINATION OF MR. STATS BY MR. McRAE:

The wire the Bank received from San Francisco for the $3,500 payment from Hildreth did not necessarily reflect a particular account or lease number, but it could have. Exhibit 15-P, the Leisureamerica file was shown to the witness and he identified the motor vehicle lease with the number at the top in that file. Mr. Kipp made the comment that the lease number indicated on the wire transfer from Mr. Hildreth was not known to the Bank. Mr. Stats testified that the amount from Hildreth deposited into Globe's checking account did not cover the balance owed by Hildreth. (Tr Vol. II at 198-199)

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 74-1660

PHILIP MICHAEL MAHAR,

Plaintiff and Appellee,

vs.

GENERAL MOTORS CORPORATION,

Defendant and Appellant.

Appeal from the United States District Court for the District of Utah
(D.C. No. C-103-73)

Jackson Howard, Provo, Utah, for Appellee.

Harold G. Christensen, Salt Lake City, Utah (Craig S. Cook, Salt Lake City, Utah, on the Brief) for Appellant.

Before MURRAH, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

This is an appeal in a diversity suit from jury verdicts in favor of appellee Philip Michael Mahar (hereinafter referred to as Mahar, Mike, or Appellee) and against General Motors Corporation (hereinafter referred to as GMC or Appellant) and the judgment awards of April 9, 1974, in accord with the verdicts for personal injuries arising out of an automobile accident which occurred about five miles north of Labarge, Wyoming, on February 11, 1973.

The judgment appealed from awarded Mahar special damages of $360,000.00 and general damages of $640,000.00. GMC seeks a new trial.

The accident occurred at about 3:00 p.m. on U. S. Highway 89 at the entrance to the Buck Ranch. Mahar, his wife, Shayne, James Hooper and his wife, Karen, were in Mahar's 1962 4-Door Chevrolet Corvair, driven by Mahar, proceeding south on the two-lane asphalt highway. The party planned to fish after stopping at the ranch to deliver a litter of kittens. Raymond Malloy and his wife, Betty, were travelling behind the Mahar vehicle in a 1973 Chevrolet Impala Sedan operated by Raymond, a District Manager of the A C Spark Plug Division of GMC. The Malloys were returning to Salt Lake City after attending a Snowmobile Meet at Big Piney, Wyoming.

The distance from Big Piney to the point of the accident is about 26 miles. The road was dry except for occasional patches of snow; the weather was overcast. Snow fell shortly after the accident and when the first Wyoming Highway Patrolman arrived at the scene about 4:00 p.m. the snow was so thick on the highway that it was impossible to discern any visible marks except for one gouge mark about three feet from the center of the highway in the southbound lane.

The Mahar car had been travelling 40 to 45 miles per hour as it neared the entrance to the ranch turnoff to the left. Mahar did not know the location of the turnoff and was relying on the Hoopers to direct him. As Mahar approached the turnoff, he slowed his car. He testified that he activated his left turn signal; put his foot on the brake and shifted into second gear; slowed to about five miles per hour; started to turn the steering wheel left into the ranch turnoff, when everything went black.

Each of the witnesses to the accident said that the road was dry and clear at the point of impact. None of the surviving occupants of the Mahar vehicle felt that vehicle "fishtail", although James Hooper believed that it had "jigged" a few inches after Mahar shifted to second gear.

Mahar testified that he did not look into his rear-view mirror before starting to turn; that his car did not fishtail; that he did not see the Malloy car before the collision; and that his car did not leave the southbound lane before the impact. The Hoopers also testified that Mahar's car did not leave the southbound lane. James Hooper believed that about 100 feet before the point of impact, the Mahar car skidded slightly on a patch of ice. He had no recollection whether the Mahar turn signal was on. He acknowledged signing a written statement soon after the accident stating that at the point of impact the highway surface was icy and that prior to the accident the Mahar vehicle "fishtailed". Mrs. Hooper's testimony was similar to that of her husband, except she had no recollection that the Mahar car fishtailed.

The Malloys testified that they first saw the Mahar car about five miles south of LaBarge; they estimated that their

vehicle was then travelling between 50 and 60 miles per hour; they recalled that the highway surface was generally slippery and snow-packed in spots, or patchy with only portions of the surface visible; that Mahar's car was travelling 30 to 40 miles per hour when they first observed it; that as Malloy's car completed a curve in the road he started to pass the Mahar vehicle, as he turned on his left turn indicator and accelerated; that then Mahar's vehicle moved into the northbound lane and began to fishtail.

Malloy testified that he then applied his brakes; that he was aware that the highway surface was slick; that he attempted to pass the Mahar vehicle on the right or come to a stop but as he was passing to the right, the Mahar car "skidded" into the path of his car resulting in the collision. Malloy stated that he did not observe any lights from the rear of the Mahar car and did not know what Mahar intended to do. After the impact Malloy left his car to ascertain if there were any injuries. He said that the surface of the highway was very slippery. Malloy's wife substantially corroborated his testimony.

Following impact, the Mahar car skidded southeasterly across the highway and came to rest in the east barrow pit; the vehicle damage was such that the front seats were pressed backward so as to "pin" James Hooper and Shayne Mahar in the back seat. Shayne's head came to rest on Hooper's lap. She was apparently dead. Mike's head was gashed. He was unconscious in the driver's seat for some time. The Malloy vehicle came to rest on the right hand shoulder of the roadway.

Additional facts must be recited in relation to alleged trial errors. However, the foregoing substantially sets forth the conflicting evidence relative to the collision.

We shall now consider each of GMC's allegations of error in the order presented to us.

I.

GMC alleges that the verdict was erroneous and excessive because evidence relating to future income was improperly received, thus permitting the jury to speculate as to the amount of lost income.

This contention is, in our judgment, the most serious and troublesome of those raised. In order to pass on the issue -- one which the Trial Court recognized as "out there in the perimeter" -- we must refer to evidence in the record bearing on the problem.

Mahar entered the Army on July 26, 1967, after receiving an undergraduate degree in Agronomy from the University of Wyoming. Following his basic training and various tests, he served as a personnel specialist and finally as an intelligence analyst in West Germany. He handled many secret documents.

His Armed Forces Qualification Test score was 140 -- in the top 1%. Following his discharge in 1969, he joined the Reserves. He was quite athletic, active in baseball, rodeo, fishing, hunting, hiking and packing. After his Army service, he worked as a guide at the Bridger Wilderness Area. He then worked as a laborer and later as a carpenter at Pinedale, Wyoming. He met Shayne in 1970 in Pinedale. They married two

[illegible] inconsistencies between a written statement [illegible] Assistant Examiner, which he had three days after the [illegible], and his trial testimony. He stated that at the time the statement was written he had a cold in his head and that "I don't remember too much my wife was in the hospital." We find that the discrepancies which came to light were fully explored to the Court and to the jury and that they had their bearing trial in the credibility test before.

No useful purpose will be served in detailing the testimony of the two Wyoming Highway Patrolmen and Deputy Sheriff [illegible] relative to investigative procedures and conclusions, save that of the unrefuted fact that by the time the investigation commenced there was at least one inch of snow on the surface of the highway; that the highway surface was slick; that it was snowing at the time; and that the only identifiable mark on the highway was a gouge mark, believed to have resulted at impact from a portion of the Mahar vehicle, located three feet into the southbound lane measured from the center line. There were [illegible] six inches of fresh snow on the shoulders of the highway.

Mahar, James Hooper and Karen Hooper, surviving occupants of the Mahar car, testified that at the point of impact the Mahar car was entirely in the southbound lane of traffic and that no portion thereof had crossed the center line, even though Mahar was then preparing to turn leftward into the ranch entrance. Kelley testified that all but some three feet of the rear [illegible] of the Mahar car was in the northbound lane due to the "[illegible]," action, and that Kelley tried to avoid impact by [illegible] sharply to his right in the southbound lane. Thus, [illegible] direct conflict between the participating witnesses [illegible] the location of the Mahar vehicle at the point

years later. Both planned to pursue further education, she as a freshman in college and he as a law student. On December 16, 1972, Mahar took the law entrance LSAT Test at Provo, Utah, after driving all night from Pinedale without sleep. His score was 476. He applied for admission to the College of Law, University of Wyoming. Although no action had been taken on that application, he and Shayne nevertheless determined to attend school there. Mahar intended to either obtain a Bachelor's Degree in engineering or a teaching certificate. However, they were unable to find adequate, reasonably priced housing in Laramie during an August, 1972, visit there.

Mahar then determined to give the matter of future educational endeavor additional consideration. He intended to make further law school entrance applications. His father and mother offered to provide some financial assistance. His father was then a Colonel in the Army, stationed in Alabama. At the time of the accident, it is questionable whether Mahar's LSAT score of 476 would have permitted his entrance into any accredited law school. In terms of pre-injury earning, Mahar earned approximately $3,500.00 in 1972. He was employed in Pinedale during 1973 until February 1st, but his earnings during this period are not reflected in the record. It is clear, however, that Mahar was endeavoring only to earn sufficient moneys to aid in his educational advancements, taking into consideration the financial assistance he was to receive from his parents and the benefits he was entitled to under the G. I. Bill.

Mahar's young wife, Shayne, was killed in the accident. The injuries suffered by Mahar are catastrophic. Following surgery and extensive rehabilitative treatment, Mahar is 100% physically disabled. He suffered complete disfunction of the

spinal cord; he will always be in a quadriplegic state; he has no control or sensation of the portion of his body below the level of his upper chest; he has no control over his urinary tract or bowels and must always employ a catheter, which is painful and cumbersome, for urinary purposes; he has no control over the reflexes or motions of his body from the waist down and the control -- or flexation -- is rated poor to poor minus from the waist upward; insofar as use of his arms is concerned, he is unable to extend his right arm in any manner and he has poor control over the wrist, forearm and fingers of his left arm; he suffers severe spasms, beyond his control, which occur at any time there is a movement of or on his body such as when he is touched with a blanket or moved from side to side in order to avert decubitus ulcers or pressure sores; that the spasms are often massive contractions manifested by flexation of his legs against his body and arms; that his speech and brain are unaffected; that he suffers from pain, anxiety and depression; that the medicines he takes include codeine to relieve pain and discomfort, librium to relieve tension and anxiety, and metamucil to aid in stimulating bowel movements; that his normal life expectancy has been reduced to three-fourths in light of anticipated complications which may include urinary tract infections with attendant deterioration of the kidneys, decubitus ulcers, and pressure sores.

Mahar must be moved from bed to wheelchair, dressed, and at all times attended. He is in need of 24-hour care. While out of the hospital he should be attended by an LPN, one who knows the problems involving the urinary and respiratory tracts and skin sores. In addition, Mahar needs a cook, a housekeeper, and a secretary if he attends school in order to read to him, take dictation, etc. He will also need special help in being lifted into his wheelchair and being moved about while

therein. Furthermore, special ramps and large doorways are required to accommodate the wheelchair. He requires much special equipment, including a special bed.

Following maximum recovery from his injuries, Mahar again determined to attempt the pursuit of law school studies. He took the LSAT Test a second time at Kanab, Utah, in 1973. He scored 683, which rated him among the top 8 percent of college graduates applying for law school admission. The LSAT Test is described as both an aptitude and intelligence test.

Donald Guinourd, Ph.D., a counseling and consulting psychologist and professor of psychology at Arizona State University, testified with respect to a series of tests Mahar undertook under his supervision and control at Phoenix in October of 1973. These tests, he testified, evidenced: that Mahar's IQ is 141, well within 1% of all white males in his age range (29), consistent with Mahar's Armed Forces qualifying test; that Mahar had the only perfect score he had ever encountered on the "digit span" test -- an example of which is that Mahar was verbally given a number, like 58972, and after a particular time span asked to recite the number, by recollection, backward; that Mahar scored in the top 2 percent of the national mean standard in vocabulary, information and similarities; the Wechsler Adult Intelligence Scale (by verbal testing) resulted in a super intelligence rating; Mahar rated high on vocational interests; and, in regard to an occupational test, which measures one's educational background and interest, the probabilities of his success were "extremely high" in the fields of psychology, biology, mathematics, chemistry, engineering, public administration, professional librarianship, lawyer, author-journalist and computer programmer. The Multiphasic Personality Inventory Testing disclosed

that Mahar was very depressed, suffering severe emotional disturbances, quite pessimistic and expressive of many bodily pains or discomforts. Dr. Guinourd believed that Mahar would profit from extensive psychotherapy in order to help him adjust to the realities of his quadraphlegic status and the death of his young wife.

Dr. Theodore Roberts, a neurosurgeon, of Salt Lake City, who performed a laminectomy and further surgical procedure on Mahar February 15, 1973, rated his disability as 100 percent. He recommended psychotherapy, and rehabilitative therapy which would include occasional hospital admissions and care.

Dr. Pedro Luis Escobar, who is on the staff of the University of Utah Medical School, specializing in physical medicine and rehabilitation, and who deals primarily with patients who have become disabled by reason of accidents resulting in cerebral vascular, amputations or spinal cord injuries, testified extensively regarding Mahar's injuries. In his opinion, Mahar suffers 100 percent disability.

Mahar, at the date of trial, had applied for and had been admitted as a law student for the Fall term, 1974, both at the University of Utah and Southwestern College of Law, Los Angeles, California. He testified that he desired to pursue the study of law.

The controversial expert testimony admitted in evidence relating to damage going to loss of future earnings was that of Boyd Fjeldsted, Ph.D., a consulting economist, and an instructor in the Bureau of Business and College Research, University of Utah. He earned his B.A., M.A. and Ph.D. degrees from the University of California at Berkley. He

with the Human Resources Institute. He has prepared a number of estimates and has testified in Utah courts as an expert relative to pecuniary damages resulting from wrongful death and personal injury cases, including estimates of the present value of future earnings. In Mahar's case, Dr. Fjeldsted employed statistics provided by the Bureau of Labor Statistics, U. S. Department of Labor, relative to compensation per man hour, including personal services, on a national basis. Dr. Fjeldsted also relied on national statistics constituting projections of estimated increases in earnings, medical care, hourly compensation of particular employees, physicians' fees, hospital charges, drug charges, etc., with a particular "discount rate" formula. He testified that there is a basis in economic fact for his estimates computed in Mahar's case. Over objection, he testified to projected future damages relating to a 29.52 age male (Mahar) with a three-fourths of normal life expectancy, commencing for computation purposes at present age except for estimate of future earnings as a lawyer, which he computed from age 32.94, as follows: (a) as a lawyer, based on national and local earnings, Mahar would earn $13,478.00 for each of the first four years, $16,500.00 annually thereafter with 4.63% annual increase, for total future earnings of $530,501.00; that as an agronomist, Mahor, from age 29.52 would realize future earnings of $335,366.00.

Dr. Fjeldsted computed these present values from April 1, 1974, forward: future orthotic equipment required, $35,700.00; three persons with reasonable medical skills such as LPN's, working eight-hour shifts per day, $814,343.00; a housekeeper, $[illegible],916.00; a secretary, working eight hours per day, five days per week, $176,124.00; psychological and/or psychiatric services, $3,151.00; orthotic devices, $71,179.00; drugs and medicines, $24,800.00; maintenance of equipment, $7,155.00.

The general rule in tort actions is that recovery cannot be had for lost wages, salary or profits, but that the element of damages for which compensation is given is that of impaired earning ability, both past and future. 81 A.L.R.2d 733; 22 Am. Jur.2d, Damages, §§ 89, et seq., § 315. Even in the case of an unemployed plaintiff (at date of the injury), the law is clear that the jury award of damages in relation to capacity to earn in the future will be upheld if proved with the requisite degree of certainty, and is not based on speculation, conjecture, passion or guess. 22 Am.Jur.2d, Damages, § 100. Evidence must be introduced which removes such an award from the area of speculative damages. Thus evidence of the plaintiff's age, life expectancy, health, training, experience, intelligence, aptitude, intent, and talents, as well as the nature of his injuries, is required to aid the jury in determining reasonable compensation. 22 Am.Jur.2d, Damages § 100; 18 A.L.R.3d 88; Boehm v. Fox, 473 F.2d 445 (10th Cir. 1973); Jaeco Pump Company v. Inject-O-Meter Manufacturing Company, 467 F.2d 317 (10th Cir. 1972).

Jury determinations and awards are presumed correct and will not be preempted unless they are clearly against the weight of the evidence. Champion Home Builders v. Shumate, 388 F.2d 806 (10th Cir. 1967).

Substantial evidence is required to support an award or legal conclusion and it must have a substantial basis of fact. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938).

There is no fixed rule or exact standard by which damages can be applied or measured in personal injury cases. Damages are awarded on the theory of a money consideration for the

suffering, loss, and injury which the injured party has sustained, the amount of which is predicated upon the facts of each case in light of the realization that there is no market value for many of the damages sustained. 96 A.L.R.2d 760; 95 A.L.R.2d 1333. Accordingly, the amount to be awarded is largely a question for the jury, to be determined in consideration of the facts and circumstances of the particular case, and wide discretion is accorded the jury in determining the amount of the award. District of Columbia v. Woodbury, 136 U.S. 450 (1890); 22 Am.Jur. 2d, Damages, § 86; 53 A.L.R. 1052.

GMC alleges that: (a) the jury verdicts are speculative in a rank sense with respect to Mahar's intention to enter into studies leading to a new occupation (the profession of law) and the evidence admitted relative to his future income therefrom; (b) the Court erred in receiving any post-accident income evidence relating to work or undertaking other than those Mahar engaged in prior to the accident; (c) the court erred in awarding Mahar complete per annum compensation necessary to replace "lost earnings" when the predicate for the expert testimony on Mahar's change of profession was that he would become a lawyer, and that (by Mahar's own testimony) his practice would be "circumscribed" yet, his "projected earnings" as a lawyer admitted in evidence were not in anywise discounted and the jury award was based on a total loss of Mahar's earning ability.

Mahar's Complaint prayed for general damages in the amount of $5,200,000.00 and special damages "as may be determined by the Court at the time of trial." [R. Vol. VII, p.2].

The Trial Court's Instruction No. 24, to which no objection was lodged, identified Mahar's "General Damages" including pain and suffering, both mental and physical, physical disability

and impairment, scars and disfigurement, loss of enjoyment of life, and impairment of future earning capacity, together with . . . value of the society, comfort, care and protection that he lost by reason of the death of his wife." The Court identified Mahar's "Special Damages" to be those claims including actual expenditures made and those which with reasonable probability will be necessary in the future for hospitalization, physicians, drugs, psychiatrists, psychologists, therapists, laboratory expenses, orthotic equipment, travel expenses connected with medical treatment, and other similar expenses, plus his loss of earnings to the date of the trial, together with the funeral and burial expenses incident to the death of his wife.

The Court did not err in giving Instruction No. 24. The jury award of general damages to Mahar of $640,000.00 was, of course, much less than the $5,200,000.00 prayed for. It included damages -- which we presume to have been carefully considered by the jury as instructed by the Court -- beyond the loss of future earnings. However, when one considers the scope and devastation of the injuries sustained by Mahar, it is not reasonable to attribute the $640,000.00 verdict as one returned, according to GMC, "under the influence of passion and sympathy." The conscientious Trial Judge denied GMC's motion for judgment notwithstanding the verdict. Without referring to each of the elements of damage reflected by the evidence, we hold that the verdicts returned and the judgment awards made in accordance therewith are not clearly excessive or predicated upon an improper evidentiary basis, bias, passion or prejudice.

We have no way of assessing the consideration given by the jury to the evidence relating to the future earnings attributable to Mahar in his capacity as a lawyer in relation to other general damages. Suffice to say, the injuries sustained

by Mahar and the pain, mental anguish and suffering he has endured and must endure in the future, are incapable of definite and certain calculation in terms of a pecuniary standard. Such awards, while difficult, rest in the discretion of the jury, subject to review, and will not be disturbed unless the Trial Court, inter alia, grants a new trial because the jury verdict is excessive. Rule 59, Fed.R.Civ.P., 28 U.S.C.; Littleton v. Western Union Telegraph Company, 442 F.2d 1169 (10th Cir. 1971); United States v. Hess, 341 F.2d 444 (10th Cir. 1965); Duffy v. Union Pac. R. Co., 218 P.2d 1080 (Utah 1950); 22 Am.Jur.2d, Damages, §§ 109, 198; 81 A.L.R. 419.

Some of the opinions dealing with the admissibility of evidence of future earnings based upon an intention formed to enter a completely new occupation or profession prior to the injury have held such evidence inadmissible and as an improper measure of damages on the ground that it is too speculative, conjectural and remote. Valley Transp. System v. Reinartz, 197 P.2d 269 (Ariz. 1948); Ohio Valley Trust Company v. Wernke, 84 N.E. 999 (Ind. 1908).

In McAlister v. Carl, 197 A.2d 140 (Md. 1964), the Trial Court excluded evidence that the injuries sustained by the plaintiff in an automobile accident prevented her from teaching physical education, even though that was her major college study. She had been trained in this field and intended to become a teacher of physical education. However, because she had not undertaken such employment at the time of the accident, the Court concluded that whether, or to what extent, a claim for damages for loss of enjoyment from pursuit of her chosen employment should be considered was too speculative to submit to the discretion of the jury. The Court did observe, however, that the application of the rule depended in large measure upon

the facts and circumstances of each particular case. The "too speculative" rule was also applied in Bonnet v. Galveston, 33 S.W. 334 (Tex. 1895).

The problems faced in connection with future earning capacity are, of course, much more difficult than those involved in a consideration of earning capacity for a concluded period. In Conte v. Flota Mercante Del Estado, 277 F.2d 664, (2nd Cir. 1960), the Court laid down the general principle relative to future earning capacity:

> The objective is to place the [claimant] in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in over-simplified form, consists of determining what [claimant's] annual earning power would have been but for the injury, deducting what it will be thereafter, multiplying the result by [claimant's][work life] expectancy, and discounting the product to present value.
>
> 277 F.2d 664 at 669.

Evidence of special circumstances indicating an ability to rise beyond one's prior level of employment is, of course, admissible. Petition of United States Steel Corporation, 436 F.2d 1256 (6th Cir. 1970), cert. denied 402 U.S. 987 (1971); Pierce v. New York Central Railroad Company, 409 F.2d 1392 (6th Cir. 1969).

In Frankel v. Heym, 466 F.2d 1226 (3rd Cir. 1972), the Court admitted expert testimony of an economist that but for the disabling accident, Miss Heym's future earnings would have been substantially greater than her past earnings based upon her scholastic achievements as a commercial art student and her

successful work in that capacity following graduation. The Trial Court, however, was held not to have erred in reducing the award in light of her temperament and personality and the probability that she would have married and borne children, thus interrupting her employment. Other decisions accept the view that evidence of an intention to enter a new occupation is admissible on the issue of damages. DeHaas v. Pennsylvania Railroad Co., 104 A 733 (Pa. 1918); Burlington-Rock Island R. Co. v. Davis, 123 S.W.2d 1002 (Tex. Civ. App. 1939).

The qualification of the witness as an expert and the question whether the subject is one properly for expert testimony is a matter largely within the discretion of the trial court. II, Wigmore on Evidence, § 561; Bosse v. Ideco Division of Dresser Industries, Inc., 412 F.2d 567 (10th Cir. 1969); Grain Dealers Mutual Insurance Company v. Farmers Union Cooperative Elevator and Shipping Association, Kirwin, Kansas, 377 F.2d 672 (10th Cir. 1967); Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962). Such a determination by the trial judge is conclusive unless demonstrated to be clearly erroneous or an abuse of discretion. Chapman v. United States, 169 F.2d 641 (10th Cir. 1948), cert. denied 335 U.S. 860 (1948); Bratt v. Western Air Lines, 155 F.2d 850 (10th Cir. 1946), cert. denied 329 U.S. 735 (1946).

We hold that the Trial Court did not err in admitting the expert testimony relating to Mahar's future income under all of the facts and circumstances reflected by this record.

II.

GMC argues that the verdict was excessive and was given under the influence of passion and prejudice.

Appellant contends that "While the sympathy of the jury was natural" it could not afford a proper basis for the amount of the verdict when no proper evidence of income projection was offered. We note that GMC volunteered in its brief that "There was no testimony introduced at trial that Mahar had suffered any brain damages, was not able to communicate or had in any way lost intellectual capacity or ability. Mahar is now a freshman student at the College of Law, University of Utah, and completed one semester of course work." [Appellant's Brief, p. 38].

We confess that we are perplexed by GMC's argument. The inference we are apparently asked to draw is simply that Mahar could not have suffered the devastating personal injuries previously described and yet pursue a law school education and profession. While we certainly assume that the jurors were in sympathy for Mahar's plight, still the evidence in this record reasonably reflects that the jurors were most likely far less dominated with prejudice or passion than they were with the realities of Mahar's injuries, disabilities, permanent physical impairments, coupled with his grit and determination to use his intellect and ability to learn and communicate in achieving a law degree with the ultimate ambition to practice law under circumstances he recognized must be "circumscribed" by reason of his physical disabilities. The jurors were obviously aware of the risks of infections and malfunction of his kidneys, together with other possible serious physical complications based on unrefuted medical expert testimony diminishing his normal life expectancy by one-fourth.

If the situation should ultimately be such that Mahar will not encroach on other than the interest or other earnings of the $1,440,000.00 awarded this would not, per se, be proof of excessiveness. To the contrary, it may as likely reflect

the intelligence, fortitude, industry, forebearance and ability of Baker, notwithstanding the adversities with which he is confronted. In any event only time can tell the actual result.

III.

GMC contends that the Trial Court erred in admitting the hearsay evidence of Fjeldsted concerning the cost of nursing, housekeeping and secretarial services.

In arriving at his opinions, Fjeldsted did rely upon a number of identified collateral sources and statistics, which, of course, were hearsay in the strict sense. We observe that it would be almost impossible for one in Fjeldsted's position to personally acquire all of the data he relied upon. Such is not required of an expert. The issue related only to the reliability of the hearsay evidence employed. Fjeldsted testified that the data and source material which he used was reliable. This was not refuted by GMC. Nor did GMC call an economic expert to refute Fjeldsted's opinions.

Fjeldsted relied, in part, upon information he had obtained from Upjohn Corporation relative to the rate of housekeeping services immediately prior to trial and information obtained from the Utah Department of Employment Security relative to secretarial and practical nursing salaries, etc.

In United States v. Sowards, 339 F.2d 401 (10th Cir. 1964), we held:

> As a general rule, an expert may testify as to hearsay matters, not to establish substantive facts, but for the sole purpose of giving information upon which the witness relied in

reaching his conclusion as to value . . . . When evidence is given for this purpose, the jury should be so instructed.

339 F.2d 401 at 402.

In the instant case, the Trial Court properly instructed the jury relative to Fjeldsted's expert testimony. We reaffirmed the Howard rule in Hickock v. G. D. Searle and Company, 496 F.2d 444 (10th Cir. 1974). And we have held that whether a witness is qualified to testify as an expert to any matter of opinion is a preliminary determination for the trial judge and that his decision is conclusive unless demonstrated to be clearly erroneous or an abuse of discretion. Chapman v. United States, supra. The "capacity" of a witness to testify as an "expert" is a relative one. II Wigmore on Evidence § 555 at p. 634 (3rd Ed. 1940).

The Trial Court carefully instructed the jury that Fjeldsted's testimony was to be given the weight to which "you deem it entitled, whether it be great or slight; and you may reject it if in your judgment the reasons given for it are unsound."

The Court did not err in the admission of Fjeldsted's expert testimony.

IV.

GMC alleges that the Court erred in admitting certain photographs and segments of a movie on the ground that they were irrelevant, immaterial and introduced to arouse the sympathy of the jury. We have carefully reviewed and examined each. The Trial Court did exclude certain portions of a movie portraying Bolar's typical daily activities following his injuries.

Each of the exhibits related pictorially to testimony previously admitted. Contrary to GMC's contentions, we agree with the Trial Court's rulings that each were admissible as depicting Mahar's pre-accident physical condition and his social and recreational habits as compared with his post-accident lifestyle, relating to the issue of damages. Nothing in the photos or in the film is inflammatory. We observe that the film was shown in chambers prior to its display before the jury. Certain portions objected to by counsel for GMC were deleted by order of the Court. Immediately prior to the film being shown to the jury, counsel for GMC stated:

> Your Honor, I might say that during the noon hour I did view this; and I'm willing to agree that the changes previously discussed with the Court were made and that the film as I view it is in accordance with what was said at that time.

No objection was made by GMC when the film was shown to the jury.

We hold that the Trial Court did not abuse its discretion in the admission of the photographs and the film and that none worked to the clear prejudice of GMC. United States v. Downen, 496 F.2d 314 (10th Cir. 1974), cert. denied _____ U.S. _____; Taylor v. Reo Motors, Inc., 275 F.2d 699 (10th Cir. 1960); Millers' National Insurance Company, Chicago, Illinois v. Wichita Flour Mills Company, 257 F.2d 93 (10th Cir. 1958).

V.

GMC claims that the Trial Court erred in permitting Mahar's attorney on cross-examination of Deputy Sheriff Kieffer to inquire concerning alleged conversations with him under the

guise of laying a foundation for impeachment, knowing that the impeaching evidence could not be offered without disqualifying Mahar's attorney from arguing the case to the jury.

While it very well may be that Mahar's counsel was taken by surprise with respect to Kieffer's trial testimony -- which counsel alleges to be directly at odds with Kieffer's prior recorded statements to him -- we agree that: (a) counsel for Mahar overreached and overbore in his cross-examination of Kieffer and asked questions beyond the scope of the direct testimony; and (b) counsel for Mahar badgered Kieffer after making him his witness -- arguumentably on the premise of surprise -- relative to matters which do not appear to us critical to any issue in the case. The Trial Court permitted much of the interrogation after Mahar's counsel made Kieffer his witness on the obvious belief that counsel was attempting to refresh the witness's memory on points, the materiality of which the Trial Judge had no way of judging at the time.

Counsel for Mahar requested of the Court that he be permitted to refresh Kieffer's memory or recollection by playing a recording of a previous conversation between counsel and Kieffer, with particular emphasis on whether Kieffer had not previously stated that he had seen small fragments of glass on the side of the road at the Buck Ranch turnoff. Kieffer had previously testified that he had not seen the glass and had no recollection of telling counsel that he had. Counsel for Mahar did not call any witness to contradict Kieffer's testimony.

It is the rule in the Circuit that when a party calls a hostile witness or is surprised by the testimony from his own witness, the Trial Court may, in its discretion, permit the

party calling the witness to cross-examine and impeach him. United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973); United States v. Beal, 430 F.2d 1085 (10th Cir. 1971).

The scope of examination and cross-examination is within the sound discretion of the trial court and will not be disturbed unless substantial rights of a party are prejudiced. Rotteakes v. United States, 328 U.S. 750 (1946); Alford v. United States, 282 U.S. 687 (1931); United States v. Worth, 505 F.2d 1206 (10th Cir. 1974). Our review of this portion of the record leads us to conclude that counsel for Mahar -- perhaps out of zeal for his client's cause -- overreached the bounds of propriety in his cross-examination and later "hostile" examination of Kieffer. Even so our review and analysis of the entire record leads us to the conclusion that these improprieties were harmless errors. They did not influence the decision of the jury in favor of Mahar's case. It is more likely that the jurors resented the episode. For these reasons we credit the jury in observing the Court's instructions and applying fundamental and impartial fairness essential to the concept of justice in arriving at the verdicts. A defendant is not entitled to a perfect trial, but rather a fair trial.

VI.

GMC contends that the Trial Court erred in giving Instruction 15 to the jury upon the issues of negligence inasmuch as no evidence was presented at trial to support it. Specifically, GMC complains that there was no evidence introduced at trial to show that Malloy failed to keep a proper lookout. We disagree.

both Malloy and his wife testified that they first observed the Mahar car some five miles away; that their vehicle was travelling between 50 to 60 miles per hour even though both Malloy and his wife (contrary to the testimony of the Mahar car occupants) testified that the highway surface was slick. To be sure, there was conflicting testimony, which need not be repeated here, concerning the facts and circumstances surrounding the accident. We have carefully reviewed the record and each of the instructions. The Trial Court's instructions were well considered, comprehensive and completely fair and impartial. We hold that the instructions fairly and adequately guided the jurors in their deliberations. It is presumed that jurors will be true to their oath and that they will conscientiously observe the instructions and admonitions of the Court. United States v. Lemon, 497 F.2d 854 (10th Cir. 1974); Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), cert. denied 401 U.S. 1010 (1971).

AFFIRMED.